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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

COUNTY OF DEL NORTE, CALIFORNIA; COUNTY OF HUMBOLDT, CALIFORNIA; DEL NORTE UNIFIED SCHOOL DISTRICT; EUREKA CHAMBER OF COMMERCE; THE PACIFIC LUMBER CO.; SIMPSON TIMBER CO.; MILLER REDWOOD CO.; BIG FLAT LUMBER CO.; WESTERN TIMBER ASSOCIATION; CALIFORNIA FOREST PROTECTIVE ASSOCIATION; DAVID SCOTT; and DAVID GALITZ,
Petitioners,

vs.

THE UNITED STATES OF AMERICA; THE DEPARTMENT OF INTERIOR; HERITAGE CONSERVATION AND RECREATION SERVICE; and WILLIAM P. CLARK, JR., SECRETARY OF THE DEPARTMENT OF INTERIOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can the Secretary of Interior include rivers in the federal wild and scenic rivers system under 16 U.S.C. § 1274(a)(ii) pursuant to the request of a state's governor when the State Legislature has yet to take final action to designate the rivers as wild, scenic, or recreational?

2. Can the Secretary of Interior include rivers within the federal wild and scenic rivers system under 16 U.S.C. § 1274(a)(ii) pursuant to the request of a state's governor when a state court has found that as a matter of state law those rivers are ineligible for the federal system?

3. Did the Court of Appeals err in upholding an environmental impact statement process (42 U.S.C. § 4332(2)(C)) which admittedly violated applicable federal regulations?

4. Did the Court of Appeals err in dismissing the lawsuit and issuing summary judgment for the nonmoving defendant parties, thereby denying plaintiffs their right to trial when the lower court found numerous genuine issues of material fact upon reviewing voluminous evidence in support of and in opposition to plaintiffs' motion for summary judgment?

LIST OF PARTIES

In compliance with Supreme Court Rule No. 21.1(b), it is to be noted that in the court below four appeals were consolidated. Those parties not listed on the caption of this petition are: Association of California Water Agencies (plaintiff-appellee); Antelope Valley-East Kern Water Agency (plaintiff-appellee); Castaic Lake Water Agency (plaintiff-appellee); Coachella Valley County Water District (plaintiff-appellee); Crestline-Lake Arrowhead Water Agency (plaintiff-appellee); Desert Water Agency (plaintiff-appellee); Kern County Water Agency (plaintiff-ap-

pellee); Metropolitan Water District of Southern California (plaintiff-appellee); Mojave Water Agency (plaintiff-appellee); San Bernardino Valley Municipal Water District (plaintiff-appellee); San Gabriel Valley Municipal Water District (plaintiff-appellee); Environmental Defense Fund (intervenor-defendant-appellant); Sierra Club (intervenor-defendant-appellant); California Trout, Inc. (intervenor-defendant-appellant); Save the American River Association (intervenor-defendant-appellant).

LIST OF CORPORATE PARTIES' PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

In compliance with Supreme Court Rule No. 28.1, the parent companies, subsidiaries, and affiliates of each petitioning party which is a corporation is as follows:

The Pacific Lumber Company (PALCO) has no parent company. The only nonwholly owned subsidiaries of PALCO are: Acetylene and Industrial Gas Cylinders Ltd., an India corporation; and Stoody Asean (M) SDN.BHD., a Malaysia corporation. PALCO has no affiliates.

Simpson Timber Company is a subsidiary of Kamilche Company. Subsidiary and affiliate companies of Simpson Timber Company are Simpson Redwood Company, the Arcata and Mad River Rail Road Company, Simpson Extruded Plastics Company, Simpson Building Supply Company, Simpson Properties, Inc., Simpson Export Sales Company, Simpson Timber Co. (Saskatchewan) Ltd., Simpson Timber Co. (British Columbia) Ltd., Simpson Paper Company, Humboldt Bay Pulp Company, and Coast Paper Company.

Miller Redwood Company is a wholly owned subsidiary of Stimson Lumber Company which is located in Oregon. Stimson Lumber Company also owns Forest Fiber Products, Northwest Petro-Chemical Company, Rellim Redwood

Company, and Miller Redwood Company-Plywood Division. All of these companies are privately owned and no public stock is available.

Eureka Chamber of Commerce, Western Timber Association, and California Forest Protective Association are nonprofit California corporations not affiliated with any other organizations, corporate or otherwise, have no parent corporations, and neither own nor control any subsidiary corporations.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California was not officially published but is reported at 19 ERC 1138 (February 11, 1983), and is reproduced as Appendix D to the Petition for Writ of Certiorari of the Association of California Water Agencies, *et al.*[1] The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 732 F.2d 1462 (1984), and is reproduced as Appendix A of ACWA. The order of the Court of Appeals denying appellees' petition for rehearing is reproduced as Appendix B of ACWA.

JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit was rendered on May 11, 1984. The order of the Court of Appeals denying the petition for rehearing was issued on July 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The text of the following provisions involved in this case is reproduced in the ACWA Appendix: Tenth Amendment to the United States Constitution; Article III, Section 3 and Article IV, Section 1 of the California Constitution; 5 U.S.C. § 706; 16 U.S.C. §§ 1271, 1273; 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1506.9 and 1506.10 (1979); and California Public Resources Code § 5093.50, *et seq.* The

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[1]Rather than file a redundant appendix, petitioners County of Del Norte, *et al.*, rely on the appendix submitted with the petition for writ of certiorari filed by the Association of California Water Agencies (ACWA), *et al.*, as well as petitioners' appendix. The ACWA appendix is cited as ACWA Appendix. Petitioners, Del Norte, *et al.*, append hereto a separate appendix of documents not included within the ACWA Appendix which is cited as Appendix.

following provisions involved in this case are reproduced in the appendix attached hereto: 40 C.F.R. § 6.401(a) (1982); 44 Fed. Reg. 47,155 (1979); and 45 Fed. Reg. 83,031 (1980).

STATEMENT OF THE CASE

The Klamath, Trinity, Smith, Eel, and American Rivers contribute 30% of California's natural annual water supply. ACWA Appendix F at 44. This amounts to over 20 million acre feet of annual freshwater flow which until recent action of the Secretary of Interior was considered under the state Burns-Porter Act (California Water Code § 12930, *et seq.*) as the primary future water source for the State of California. ACWA Appendix G. These significant rivers and their dependent lands sustain substantial public and private timber production, flood control capabilities, potential hydroelectric power generation, and provide concomitantly a critical source of employment to a severely economically depressed area of the state. ACWA Appendix F at 38-46; Appendix 9. On July 18, 1980, action was initiated which would if successfully upheld destroy these crucial resource capabilities.

On that day California Governor Edmund G. Brown, Jr., requested by letter to Cecil Andrus, Secretary of the United States Department of the Interior, that portions of the Klamath, Trinity, Smith, Eel, and American Rivers and certain specified tributaries thereof be included within the national wild and scenic rivers system, pursuant to Section 2(a)(ii) of the National Wild and Scenic Rivers Act, 16 U.S.C. § 1273(a)(ii) (federal act). Inclusion would foreclose any future water development projects on these rivers. Precipitating this request was the inability of the Brown administration to convince the State Legislature to approve state wild and scenic river management plans for these rivers for the purpose of preventing future development projects on these rivers.

The California Wild and Scenic Rivers Act (California Act), Public Resources Code § 5093.50, *et seq.* (ACWA Appendix L at 104), creates the California wild and scenic rivers system. Those rivers requested by Governor Brown for inclusion in the national system had been preliminarily listed as components of the California system but the California Legislature had declined to permanently designate them as wild, scenic, or recreational rivers. ACWA Appendix P at 184; Appendix 1. Moreover, as stated above, management plans, necessary under the state act for protection, had not been approved by the Legislature. ACWA Appendix P at 184; Appendix 1. Under the California Act[2] the Secretary of the State Resources Agency had the authority to administer the California system pursuant to a legislatively approved management plan. Pub. Res. Code § 5093.58. ACWA Appendix L at 108. However, until such a plan was prepared and submitted to the Legislature and approved by it, the Resources Secretary had limited power with respect to managing the component rivers in the California system. ACWA Appendix P at 185.

Due to an apparent attitude that a heightened level of protection would be difficult to obtain from the California Legislature, Governor Brown decided to make an end run around the Legislature and filed an application with the Department of the Interior to include the rivers in the federal system.

The National Wild and Scenic Rivers Act, 16 U.S.C. § 1273 (ACWA Appendix K at 88), authorizes a river to be added to the federal system by either of two methods. Under the first method the federal government takes a prominent role with Congress acting to make the addition. The second method finds the *state* taking the prominent role

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[2]Unless otherwise specified, all references are made to the California Act as it existed on January 19, 1981, the date of the administrative decision challenged herein.

wherein the Secretary of Interior may add a river to the federal system only if (1) the State Legislature has designated the river as wild, scenic, or recreational; (2) the state has committed itself to permanently administer the rivers as wild, scenic, or recreational at no expense to the United States; and (3) the rivers are found by the Secretary to meet the federal criteria for wild, scenic, and recreational rivers. This second method was selected by Governor Brown.

In undertaking to process the application of Governor Brown, Secretary of Interior Andrus determined that granting the request would constitute a major federal action within the meaning of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* Accordingly, the Secretary undertook to prepare an environmental impact statement (EIS) that analyzed the environmental factors pertinent to his decision. However, because of the strong possibility that there would be a change in the federal administration in January of 1981, the respective federal and state parties resolved to take whatever action was necessary so as not to lose this "rare opportunity." ACWA Appendix R. Because the Department of Interior's lead agency, the Heritage Conservation and Recreation Service (HCRS), could not complete the EIS by January, 1981, without help, California's Resources Agency and the Department of Interior entered into an agreement whereby the time to prepare the EIS was shortened from a normal time frame in excess of 12 months to 5 months. ACWA Appendices S and T. The plan was designed to ensure that Secretary Andrus, rather than a potential new Secretary of Interior, would be able to make a final decision in response to the Governor's application. Thus, HCRS set out to complete the EIS process in near record time. In order to meet the short schedule, it was necessary for the applying agency, the California Resources Agency, to play a significant role in appraising the environmental consequences

of its own proposal. Accordingly, the Resources Agency and HCRS entered into a cooperative work agreement distributing between themselves the tasks necessary to develop an EIS. ACWA Appendix T. The draft EIS was filed with the Environmental Protection Agency (EPA) on September 16, 1980, less than *two* months after Governor Brown's application was made and less than *one* month after the cooperative work agreement was signed. Substantial comments were submitted by many interests, including petitioners herein, challenging the adequacy of the draft EIS.

On October 20, 1980, various interested parties including the County of Del Norte filed suit in the Sacramento County Superior Court for the State of California. At issue was the legality of Governor Brown's application to Secretary Andrus in light of the California Legislature's failure to take action necessary for the rivers to be eligible for the federal system.

In a memorandum decision issued December 1, 1980, the court found that the State Legislature had not taken the action necessary to commit itself to permanently administer the five rivers in the California system as wild, scenic, or recreational because no management plan had yet been approved. The court also found that the Legislature did not intend that the Governor could bypass the necessity for legislative approval of management plans by placing the component rivers of the California system under a federal program which would place them beyond the management plan approval of the Legislature. And, finally, the court found that the Department of Interior has the authority under the federal act to determine whether rivers sought to be included are subject to permanent administration by an agency of the state within the meaning of the federal act, but only in light of the court's interpretation of the California Act. ACWA Appendix P and 185-86.

On December 1, 1980, the comment period for the draft EIS was closed. Thereafter, the state Resources Agency and Department of the Interior undertook to gather new data formulating new analyses for preparation of the final EIS. Finally, after the generation of significant new data relating to environmental and socioeconomic impacts and relating to changes in the analyses of the impacts of the alternatives considered, HCRS filed the final EIS with EPA on December 12, 1980. Appendix 2.

Council of Environment Quality (CEQ) regulations governing the EIS process state that EISs may be filed with EPA "no earlier than they are also transmitted to commenting agencies and made available to the public." 40 C.F.R. § 1506.9 (1980). ACWA Appendix N at 143. CEQ regulations also state that EPA shall publish a notice of availability of the final EIS in the Federal Register (notice) the week after the final EIS has been filed and that the Secretary must allow a 30-day cooling-off period to run from the date the notice was properly published before he can act on the Governor's request. 40 C.F.R. § 1506.10 (1980). ACWA Appendix N at 144.

However, at the time the final EIS was filed with EPA, Friday, December 12, 1980, the requirements of Section 1506.9 had not in fact been met, though a Department of Interior official signed a false affidavit verifying that they had been. Appendix 2. No effort was made to notify the public of the EIS's availability in the California offices of HCRS until Monday, December 15, 1980, and even then the notification was by news release and mail. Appendices 6 and 7. The significance of this time sequence is that without filing a false verification and violating the regulations, the Department of Interior could not have had a notice published during the week of December 15 in order to allow the running of the mandatory 30-day cooling-off period before January 20, 1981, the day the new administration

was to take office. Only by virtue of a falsified record was Secretary Andrus assured the ability to make the decision prior to leaving office.

Meanwhile on January 12, 1981, Robert Bergland, the Secretary of the United States Department of Agriculture, wrote to Secretary Andrus requesting he exclude from any federal designation segments of the rivers at issue which flow through the national forests. Secretary Bergland indicated that the "impacts on the multiple resources of the National Forest lands could not be adequately assessed in the abbreviated time used for preparing the draft and final environmental statements." Appendix 8. Secretary Bergland also indicated that in accordance with the National Forest Management Act of 1976 the Forest Service was presently conducting a comprehensive management planning effort with respect to the river resources at issue and stated that "[a]ny action to fragment the decision resulting from the Forest planning process would be premature and undesirable." Appendix 8. Nevertheless, without correcting the deficiencies in the EIS process, without correcting the deficiencies in the substantive document, without adhering to the National Forest Management Act requirements, and without deferring to the California court's determination that under California law the rivers were not eligible for inclusion in the federal system, Secretary Andrus added various portions of the subject rivers to the federal system at 7:45 p.m., January 19, 1981. ACWA Appendix J.

Thereafter, numerous parties, including petitioners herein, filed suit in the United States District Court for the Northern District of California challenging the legality of the designation.[3] Petitioners moved for summary judgment on March 20, 1981, and after voluminous evidentiary presentations, briefing, and oral argument, the court issued

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[3]Earlier suits in the same court filed to enjoin designation were dismissed as premature by the Ninth Circuit Court of Appeals.

on February 11, 1983, a Memorandum of Decision granting summary judgment to plaintiffs and petitioners herein. ACWA Appendix D. The court found that Secretary Andrus' designation was defective because of the failure of HCRS to comply with Sections 1506.9 and 1506.10 of the CEQ regulations. Summary judgment was issued also on the ground that the State Superior Court's decision with regard to California's lack of ability to permanently administer these rivers as wild, scenic, and recreational had not been adequately considered by Secretary Andrus in making his decision.

The court was also asked by plaintiffs to grant summary judgment with regard to numerous deficiencies in the final EIS. The court found that the resolution of those issues was inappropriate for summary judgment because the federal defendants had adequately raised triable issues of material facts. The decision was then appealed to the Ninth Circuit Court of Appeals and in an opinion dated May 11, 1984, the Ninth Circuit reversed the District Court and remanded the matter for entry of judgment in favor of the defendants. ACWA Appendix A. Upon petition for rehearing filed on May 25, 1984, petitioners pointed out that not only had the court failed to address specific issues regarding the authority of Secretary Andrus and the violation of procedural requirements but the Court of Appeals had ordered the lawsuit dismissed thereby disposing of a substantial portion of petitioners' case without permitting a trial to which the petitioners were entitled. Petition for rehearing was denied on July 5, 1984. ACWA Appendix B.

The jurisdiction of the District Court was invoked by petitioners under 28 U.S.C. § 1331(a).

REASONS FOR GRANTING THE WRIT

I

IN MAKING THE DESIGNATIONS TO THE FEDERAL SYSTEM THE SECRETARY OF INTERIOR CIRCUMVENTED A STATE COURT INTERPRETATION OF STATE LAW WHICH FOUND THE SUBJECT RIVERS INELIGIBLE FOR DESIGNATION

A river may be added to the National Wild and Scenic Rivers System, 16 U.S.C. § 1271, *et seq.*, in two ways. Congress may add a river by legislation, 16 U.S.C. § 1273(a)(i), or the Secretary of Interior may do so upon application of the Governor of the state through which the river flows if:

1. the river is designated as wild, scenic, or recreational by or pursuant to an act of the Legislature of the state or states through which it flows;

2. the river is to be permanently administered as wild, scenic, or recreational by an agency or political subdivision of the state or states concerned without expense to the United States; and

3. the river is found by the Secretary of Interior to meet the criteria established for federal wild, scenic, and recreational rivers. 16 U.S.C. § 1273(a)(ii).

By the clear wording of the statute the Secretary of Interior is given some discretion with regard to the determination of whether a river proposed for designation meets the "criteria" of the national act. The legislative history discloses that "the principal criteria referred to are those set out in the policy statement in Section 1 of the bill, 16 U.S.C. § 1271, and the standard implicit in the classification system outlined in Section 2(b), 16 U.S.C. § 1273(b), H.R. Rep. No. 1623, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Ad. News at 3809. Generally, the secretary must find that

qualitative criteria are met such that the river is free flowing and possesses "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values . . . ." 16 U.S.C. § 1271; ACWA Appendix K at 88, and that the rivers satisfy the qualitative descriptions of wild, scenic, or recreational as defined in 16 U.S.C. § 1273(b). ACWA Appendix K at 89-90.

The national act gives the Secretary of Interior no discretion to determine whether the conditions to the first two requirements for designation are met. First is the question of whether the State Legislature has designated the river as wild, scenic, or recreational. Whether this condition has been met is a matter of state legislative prerogative. The state is relied upon by the federal government to be the active designating party. As described in the legislative history at Page No. 3808:

> "[O]ne of the premises on which H.R. 18260 [Wild and Scenic Rivers Act] is built is the belief that the States and their political subdivision should be encouraged to play a prominent role in the development of the National Scenic Rivers System. It is for this reason that the bill includes provisions allowing the States to name State-administered rivers as candidates for inclusion in the system and authorizing the Secretary of the Interior to include such State-named and State-administered rivers in the system if they meet the standards of the act."

Such legislative history underscores the intention of Congress to rely upon the state's own decisions to designate or not to designate rivers within its boundaries as wild, scenic, or recreational. The state plays the prominent role and the Secretary of Interior is to abide by the state's decision.

The second condition for inclusion within the federal system, that the state has committed itself to permanently administer the rivers as wild, scenic, or recreational at no

expense to the United States, is also clearly denoted within the legislative history as a matter of state prerogative and state law. The legislative history states: "the *State must agree* that the river will be permanently administered as a scenic river without expense to the United States . . . ." House Report No. 1623 at 3809 (emphasis added). Thus, a question for this Court to decide is whether the state has reached such agreement. As is later demonstrated, the answer in this case is a resounding "no."

In analyzing whether the first two requirements of 16 U.S.C. § 1273(a)(ii) have been met, the administrative agency, as a reviewing federal court, must defer to a state's interpretation of state law. As stated in *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), "[t]his Court . . . repeatedly has held that state courts are the ultimate expositors of state law [citation omitted] and that we are bound by their constructions except in extreme circumstances . . . ." In the instant case the secretarial decision which was upheld by the Court of Appeals ignored the fact that the California State Legislature had not only not completed its designation of the five rivers to its state wild and scenic rivers system but had even delivered a letter to Secretary Andrus signed by a majority of its members emphasizing that federal designation was premature. Appendix 10. The decision also ignored the opinion of a state court judge to the effect that California had not yet agreed that the subject rivers would be permanently administered as wild, scenic, or recreational without expense to the United States. This presents a clear conflict between a federal administrative agency and a state court which needs to be resolved by this Court.

A. The California State Legislature Had Not Yet Designated as Wild, Scenic, or Recreational the Five Rivers for Which Federal System Designation Was Sought

The California Wild and Scenic Rivers Act, Public Resources Code § 5093.50, *et seq.*, was adopted in 1972. ACWA

Appendix L at 104. Pursuant to the Act, parts of the Klamath, Trinity, Smith, Eel, and American Rivers were preliminarily designated for inclusion in the wild and scenic rivers system in California. Pub. Res. Code § 5093.54(a), (b), (c), (d), and (e). But this was only the first step in a two-step legislative process for designating these specific rivers under the state system as wild, scenic, or recreational. After this first step, the Resources Agency Secretary was responsible for preliminarily classifying the rivers as either wild, scenic, or recreational (Pub. Res. Code § 5094.53) and then preparing, in close coordination and cooperation with the counties through which the rivers flow, specific management plans for the administration of the rivers and their adjacent planned areas in accordance with their specific classifications (Pub. Res. Code §§ 5093.58 and 5093.59). Prior to the adoption of any management plan, the Resources Secretary was required to "hold a public hearing in each county through which the rivers flow and . . . submit the plan to each county for its review as to the portion of the plan affecting the county." Pub. Res. Code § 5093.59. After completion of the draft plan the Secretary was responsible for submitting each management plan to the California Legislature for completion of the second legislative step for designation.

That second step, required to trigger the full protective effect of the California Wild and Scenic Rivers Act, was to be effectuated by the Legislature's discretionary approval of the specific management plan. Pub. Res. Code § 5093.58(e). As of the date that Secretary Andrus took action to designate the five rivers to the federal system, January 19, 1981, the California Legislature had not yet taken this crucial final step towards any of the specific rivers. Appendix 1 at 13. No rivers had been permanently designated as wild, scenic, or recreational nor had any management plan been adopted.

Thus, under California's system for designating a river as either wild, scenic, or recreational the Legislature had

not yet taken the final step needed to accomplish the "designation" task. Without this required final legislative act, these five rivers did not satisfy the federal act's objective criterion of state "designation" as wild, scenic, or recreational rivers and were ineligible to qualify for federal designation pursuant to 16 U.S.C. § 1273(a)(ii). The Court of Appeals ignored the failure of the five rivers to meet this objective standard and found instead that the Secretary of Interior has not abused his discretion. However, because the Secretary had *no* discretion with regard to this first eligibility requirement, the lower court's decision violates 5 U.S.C. § 706(2)(B) as not being in accordance with law and raises a serious issue which should be reviewed.

B. Secretary Andrus' Designation of the Five Rivers to the Federal System Failed to Defer to the State Court Interpretation That Under State Law There Was No Present, Permanent Administration of the Five Rivers as Wild, Scenic, or Recreational

For designation of rivers to the federal wild and scenic rivers system pursuant to 16 U.S.C. § 1273(a)(ii), the state rather than the federal government plays the prominent protective role. Not only must the State Legislature have conclusively acted to designate rivers as wild, scenic, or recreational, but the state must have agreed to permanently administer as wild, scenic, or recreational without expense to the United States the rivers sought to be included within the federal system. House Report No. 1623 specifically states that "the *State must agree* that the river will be permanently administered as a scenic river without expense to the United States . . . ." *Id.* at 3809 (emphasis added).

In other words, a fundamental question herein is whether California had made the commitment necessary to permanently administer the rivers Governor Brown sought to include in the federal system. The California

Legislature obviously did not feel this commitment had been made yet. A majority of its members admonished Secretary Andrus that Governor Brown's request was premature because the Legislature had not yet approved any management plans necessary for administration of the state's wild rivers. Appendix 10. Superior Court Judge Fred Marler agreed, stating:

> "It appears from the language of the California Act that the Resources Secretary has the authority to administer the System pursuant to a legislatively approved management plan. Until such plan is prepared, submitted to the Legislature and approved by it, the Resources Secretary has limited power with respect to component rivers in the System.
>
> "The conclusion the Court reaches as to statutory construction of California law is that the present state of law and fact in California is such that the Secretary of Resources cannot guarantee to 'permanently administer' the five rivers designated by statute."[4] ACWA Appendix P at 185-86.

The California Act, without further action of the Legislature, merely provided a procedure whereby comprehensive long-range management plans could be developed. Without enacted management plans the state did not have the mechanism to permanently administer the rivers. Secretary Andrus was required to accept this statement of state law, as even this Court "not only accepts but is bound by the construction given to state statutes by the state

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[4]As of the date of the Secretary's decision, January 19, 1981, the California Wild and Scenic Rivers Act required the State Legislature to approve management plans. Since then this requirement has been changed as have several other provisions of the Act. *See* ACWA Appendix M. These amendments are not relevant, however, because the statute as it existed when defendant secretary acted should be applied to this litigation. *Bradley v. School Board of City of Richmond,* 416 U.S. 696 (1974).

courts." *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 U.S. 495, 499-500 (1947). Nevertheless, Secretary Andrus not only failed to accept, but rejected the Superior Court's interpretation.

Secretary Andrus also usurped from the California Legislature its designated role in determining the future of the state's river system. As the Legislature noted, it had "reserved to itself judgement as to how these [wild] rivers and their related land resources were to be managed in the future." Appendix 11 at 1.[5] Nevertheless, Secretary Andrus acted and thereby encroached upon a sovereign function reserved to the State of California by the Tenth Amendment to the Constitution. In *National League of Cities v. Usery,* 426 U.S. 833 (1976), this Court stated that "Congress may not exercise [its] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. . . . [S]uch assertions of power, if unchecked, would . . . allow 'the National Government [to] devour the essentials of state sovereignty' . . . ." *Id.* at 855 quoting *Maryland v. Wirtz,* 392 U.S. 183, 205 (1968) (Douglas, J., dissenting). The Department of Interior must act with the same constitutional restraint when, as here, it is purportedly implementing congressional legislation.

The Court found in *National League of Cities* that Congress could not mandate minimum wage standards for all employees of states and their political subdivisions. Like the proposed wage standards in *National League of Cities,*

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[5]The Legislature recognized when it adopted the California Act that the future water supply and flood control needs of the state demanded management flexibility. Accordingly, it specifically called for evaluation of exclusion of the Eel River and its tributaries from the state system in 1985. Pub. Res. Code § 5093.54(d); ACWA Appendix L at 106. The Legislature has been denied this management prerogative by Secretary Andrus' action.

the Department of Interior's designation of the five California rivers to the national wild and scenic rivers system will not only impose "substantial costs" on the State of California (the rivers collectively constitute 30% of the state's natural water supply, ACWA Appendix F at 44), it also "directly supplants the considered policy choices of the States' elected officials . . . ." *Id.* at 848. The California Legislature had established a procedure whereby portions of the state's river system could be kept from private development and managed for the public benefit. The federal government acted affirmatively to keep the California Legislature from using its procedures to determine the future of five state rivers. In so doing, the federal government infringed upon the state's sovereign integrity and function in violation of the Tenth Amendment.

Aside from encroaching upon Tenth Amendment rights, the Secretary of Interior assisted Governor Brown to circumvent state law in a manner that contravened California's own constitution. As previously mentioned, the relevant state statute in existence at the time of Secretary Andrus' designation required approval of management plans by the State Legislature before a river could become part of the state's wild and scenic rivers system. As Judge Marler observed in *County of Del Norte v. Brown* "the Legislature did not intend that the Governor . . . bypass the necessity for legislative approval of management plans by placing the component rivers under a federal program which would place them beyond the management plan approval which the Legislature has reserved to itself." ACWA Appendix P at 186. The method used by Governor Brown to bypass legislative approval thus also violates the separation of powers doctrine embodied in the California Constitution. *See* Cal. Const. art. III, § 3; ACWA Appendix K at 100. Accordingly, the Secretary's decision contravenes an authoritative interpretation of relevant state law, violates federal and state constitutional principles, and requires review by this Court.

II

PROCEDURES USED TO PROCESS THE EIS ADMITTEDLY VIOLATED CEQ REGULATIONS YET THE COURT OF APPEALS IMPROPERLY DISMISSED THE VIOLATIONS AS TRIVIAL

It is undisputed that the HCRS, lead agency for preparing the EIS, violated significant requirements of certain CEQ regulations. Appendix 6. The apparent purpose, claimed irrelevant and of no moment by defendants, was to ensure that Secretary of Interior Andrus could include the five rivers in the federal system prior to his leaving office. ACWA Appendices R and S. In the end, even after compressing the normal EIS preparation period from over 12 months to 5 months and after abridging CEQ regulations as facilitated by the filing of a false affidavit, Secretary Andrus was not able to act to add the rivers until 7:45 p.m. of January 19, 1981, the last day of President Carter's administration. ACWA appendix J.

The CEQ regulations for preparation of EISs are binding on federal agencies. *Andrus v. Sierra Club*, 442 U.S. 347, 357 (1979). Two such regulations are found at 40 C.F.R. §§ 1506.9 and 1506.10(a). Section 1506.9 provides that EISs "shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public." The EIS was filed with EPA on Friday, December 12, 1980, and an HCRS agent verified that in effect Section 1506.9 had been complied with. Appendix 2. However, Section 1506.9 had not been complied with as was later admitted by federal defendants:

> "The facts here show that on Friday, December 12, 1980, an [HCRS] employee . . . delivered the FEIS to the EPA in Washington, D.C. On that date he signed a form receipt verifying that 'complete distribution to all Agencies/persons has been made simultaneously with

> the filing.' *This was not true. HCRS had no copies available on that date. Copies of the FEIS were not made available to the public until Monday, December* 15, 1980." Appendix 6 (emphasis added).

The significance of this early filing is not apparent until Sections 1506.10(a) and 1506.10(b) are read together. Section 1506.10(a) states that EPA

> "shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the *preceding* week. The *minimum* time periods set forth in this section shall be calculated from the date of publication of this notice." (Emphasis added.)

Section 1506.10(b) in relevant part states that

> "[no] decision on the proposed action shall be made or recorded . . . by a Federal agency until the later of the following dates:
>
> "(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.
>
> "(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement."

Pursuant to Section 1506.9, HCRS was not authorized to file the final EIS with EPA until at the earliest December 15, 1984.[6] Pursuant to Section 1506.10(a), notification of the final EIS availability should not have been published in the Federal Register until December 22, 1984, at the earliest. If Secretary Andrus had been required to wait the 30 days provided by Section 1506.10(b), designation of the five

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[6]The FEIS itself states that it was not made available to the public until December 17, 1984, five days after it was filed with EPA.

rivers to the federal system could not have occurred until January 21, 1981—when Secretary Andrus no longer had authority to make the designation.[7]

The Circuit Court found that these uncontroverted violations were "trivial" and HCRS and the secretary therefore had no cause to follow unambiguous regulatory directives. This ruling ignored well-settled law that to the contrary, "[so] long as [a] regulation is extant it has the force of law." *United States v. Nixon*, 418 U.S. 683, 695 (1974). The ruling also contravenes a central tenet of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), where this Court stated that while a federal agency may grant procedural rights beyond the minimum established by Congress, a reviewing court cannot require such rights if the agency in its discretion chooses not to grant them. By analogy, HCRS should be permitted to extend time periods for public review and comment beyond the minimum established by Congress but under no circumstances should a court be permitted to ratify HCRS' retraction of minimum time lines in violation of regulations binding upon the agency.

Under these circumstances, HCRS and the Secretary's intentional violations of CEQ regulations in order to accomplish a political objective cannot be viewed as trivial but must be considered significant and consequential. Petitioners were gravely prejudiced by these avowed political

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[7]EPA regulations establish that its Office of Federal Activities "is responsible for the conduct of the official filing system for EISs. . . . The . . . 30-day review periods for . . . final EISs . . . [is] computed from the Friday following a given reporting week." 40 C.F.R. § 6.401(a) (1978). Appendix 3. Using this calendar Secretary Andrus could not have acted until January 25, 1984.

maneuverings involving the unabashed violations of unambiguous procedural regulations.[8] The fundamental purpose of these and indeed all procedural regulations is to facilitate the fair resolution of clashes of interest which almost always attend government decisions. When government officials ignore the law to achieve their political objectives, the public interest in the integrity of the procedural rules which structure public decision making is gravely injured. With no redress, the public interest is fatally harmed.

III

THE COURT OF APPEALS IMPROPERLY GRANTED NONMOVING DEFENDANTS SUMMARY JUDGMENT EVEN THOUGH THE RECORD AS RECOGNIZED BY THE DISTRICT COURT DEMONSTRATED THAT THERE WAS A COMPLEX ARRAY OF TRIABLE ISSUES OF MATERIAL FACT

Plaintiffs and petitioners herein, County of Del Norte, *et al.*, moved for summary judgment before the United States District Court on a complex array of factual issues concerning the adequacy of the environmental impact statement process employed by HCRS. The District Court encapsulated the argued deficiencies in the EIS as "insufficient opportunity for comment; substantially new and

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[8]The Circuit Court found that HCRS and Secretary Andrus' violations of unambiguous regulations constituted harmless error. However, "[t]he Secretary can rely on harmless error only 'when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached.'" *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982). Obviously, adhering to the regulations would have prevented Secretary Andrus from acting. There is no question but that the standard for applying harmless error cannot be met where the substance of the decision could have been altered dramatically had a new secretary properly been given the responsibility for acting on Governor Brown's application.

different material in F.E.I.S.; of alternatives of impact; failure of concurrent preparation with ongoing Forest Service management planning; failure to adequately describe impacts of alternatives which were considered; biased and misleading comparison of alternatives." 19 ERC at 1143. ACWA Appendix D at 31.

The District Court reached the following conclusion: "None of the above issues are susceptible of resolution on motion for summary judgment." 19 ERC at 1143; ACWA Appendix D at 31. In the process of evaluating one of the issues, the court declared that "the declarations of Sheryl Karpowitz and Donald Asquita stand in stark contrast to those of Barbara Jo Talley, Charles Pike, Stephen McCalley, Steven Kasower, Joseph Menton, Karl Haugh, and Arthur Godwin with respect to contentions that the FEIS impermissibly contained material not included in the DEIS, and that by reason of that variance important issues escaped scrutiny and comment. Obviously, the modality of summary judgment is inappropriate for resolution." *Id.* at 1143; ACWA Appendix D at 32.

The court continued:

> "With respect to the contentions that impact of the alternatives presented are not adequately presented, I cannot say that the F.E.I.S. reliance on the report of the California Energy Commission which is said to be impermissably [*sic*] uncritical, or that the factors set forth in the declaration of Teerink with respect to the preclusion of water development require a summary resolution. These are complex issues of great moment to the future well being of California. The only appropriate vehicle of resolution is trial." *Id.* at 1143; ACWA Appendix D at 33.

The court likewise found that resolution of the adequacy of the EIS discussion regarding the effect of restrictive timber harvesting, water quality, fisheries, and mining was

also of great moment to the future of California and inappropriate for summary judgment. *Id.* at 1143. No doubt contributing to the court's opinion was the Secretary of Agriculture's opinion that the draft and final EIS process did not provide a clear picture "of the impacts, costs, and benefits" from inclusion of the rivers in the federal system. Appendix 8.

The court was compelled to conclude that because of the complexity of the allegations and the importance of their resolution to California, triable issues of material fact were raised which cast doubt as to whether the EIS was substantively adequate. The truth of the allegations was uncertain, and as this Court admonished in *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 468 (1962), unless on the record it is quite clear what the truth is, summary judgment should not issue. The District Court followed this admonition and denied the motion. The Court of Appeals did not.

The Circuit Court independently evaluated the factual allegations and counterallegations of the respective parties and summarily concluded without entertaining any argument or briefing on the adequacy of the EIS that there were no genuine issues of material fact. ACWA Appendix B at 11. This stands as a stark and utterly unreasonable contradiction of the finding of the District Court. The Court of Appeals simply failed to abide by the well-settled rule that summary judgment "should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." *Associated Press v. United States,* 326 U.S. 1, 6 (1945). Moreover, the Court failed to invoke the standard of review that "[o]n summary judgment the inference to be drawn from the underlying facts contained in such materials [affidavits, exhibits, depositions] must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold,* 369 U.S. 654, 655 (1962), accord *Adickes v. S. H.*

Kress and Co., 398 U.S. 144 (1970). *See also United States v. Dibble*, 429 F.2d 598, 601 (9th Cir. 1970). As has been judicially noted, unless the case is clear, the appellate court should not order summary judgment for the nonmoving party but should remand for further development of the case which may include the making of a motion for summary judgment by the prior nonmoving parties who prevailed on appeal. *See Elder v. Brannan*, 184 F.2d 219 (D.C. Cir. 1950), *aff'd in part and rev'd in part on the merits*, 341 U.S. 277 (1951). Such judicial restraint should have been employed by the Circuit Court because this case is anything but clear.

The District Court's decision demonstrated that this case contains a complex array of factual questions which are of great moment to the future well-being of California. The resolution of these questions, necessary to a determination of the adequacy of the final EIS, cannot be fairly resolved until the case is remanded to the District Court for full trial.

CONCLUSION

This case presents a serious attack on our system of government. The Federal Wild and Scenic Rivers Act, 16 U.S.C. §1273(a)(ii), envisions that additions to the federal system will be the product of federal and state cooperation. The Secretary of Interior, however, interpreted the federal act to give him unbridled discretion with regard to these additions, empowering him to force them onto a state. The Secretary lost sight of the fact that ours is a federal system of government with a division of powers between federal and state governments. The Secretary's action in this case has seriously damaged the state's right to legislate effectively and freely.

In addition, the case presents the important question of whether a trivial error doctrine can be used to insulate a federal official's politically motivated decision when that decision was made in conscious violation of federal regulations which, if followed, would have prohibited the

official's ability to make the decision. Also, the case calls for a determination of the authority of a federal Court of Appeals to render summary judgment to a nonmoving party when the trial court has found that the record presents numerous triable issues of fact. Clearly, the Court of Appeals has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of the Court's power of supervision.

In summary, this case raises important statutory and constitutional questions, the resolution of which will determine in part the scope of a state's fundamental right to interpret its own laws and to manage its natural waterways. It is to be emphasized, however, that this is not a case involving irreparable harm to a river system. The State of California has an extensive regulatory system for wild and scenic rivers which when properly invoked will freely allocate resources to manage the rivers in their natural state. This *is* a case involving irreparable harm to the integrity of a state's legislative process and irreparable harm to the public's trust that the procedural rules that structure federal agency decision making will not be eschewed in order to achieve political objectives. This case has serious national consequences which demand the issuance of the writ of certiorari.

Respectfully submitted,

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(Appendices follow)

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Appendix 1

UNITED STATES DEPARTMENT
OF THE INTERIOR
Office of the Secretary
Washington, D.C. 20240
January 16, 1981

MEMORANDUM

To: Secretary

From: Director, Executive Secretariat, Holly Miller

Subject: Application by State of California to Add Five Rivers to the National Wild and Scenic Rivers System

Attached for your use in deciding on whether to add the five rivers proposed by the State of California to the National Wild and Scenic Rivers System are the following:

1. The Secretarial Issue Document
2. A summary of Departmental comments and votes
3. Copies of any comments and votes
4. An analysis of the comments on the Final EIS
5. A decision sheet
6. The Final EIS on the applications
7. Notices to the *Federal Register*

Once you decide on the option and sign the decision sheet, please also sign the appropriate notice to the *Federal Register* of your decision.

Attachments

cc: S/Jankel
S/Dyke

SECRETARIAL ISSUE DOCUMENT
CALIFORNIA RIVERS APPLICATION

I. Introduction

II. Legal Issues

III. Summary of Findings of Eligibility and the State's Ability to Permanently Administer the Rivers

- A. Findings of Eligibility
- B. Findings of the State's Ability to Permanently Administer the Rivers
- C. Findings on State Designation of Rivers

IV. Decision Options

- A. Introduction
- B. Summary of Options
- C. Preference Sheet

Attachments

Final Environmental Impact Statement on the Proposed Designation of Five California Rivers in the National Wild and Scenic Rivers System

Evaluation Report on the Eligibility of the Five California Rivers for Inclusion in the National Wild and Scenic Rivers System

Evaluation of California's Ability to Permanently Administer State Rivers

SECRETARIAL ISSUE DOCUMENT
CALIFORNIA RIVERS APPLICATION

I. Introduction

The Wild and Scenic Rivers Act, Public Law 90-542 (as amended) declares it

> ". . . to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, . . . The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes."

The National Wild and Scenic Rivers System includes rivers that:

(1) are authorized for inclusion by an Act of Congress (Section 2(a)(i)), and

(2) are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow, that are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State or States concerned, that are found by the Secretary of the Interior, upon application of the Governor, to meet the criteria of this Act and any supplemental criteria established by the Secretary of the Interior, and which are approved by the Secretary. (Section 2(a)(ii))

On July 18, 1980, Governor Brown of California petitioned the Secretary of the Interior to add all or portions of five California rivers to the National System. These are the Smith, Eel, Trinity, Klamath and lower American. (See p. S-3 of the FEIS for a detailed description of the river segments.) These rivers had been designated in the State Wild and Scenic Rivers System in 1972. The application was supplemented with additional information on September 10, 1980. A determination that the application was adequate for the Department to process for public comment and review was issued to the State on September 17, 1980.

The river resources involved in the State's application are protected to a great extent by their inclusion in the State System. Inclusion in the National System as well would have two major effects: (1) it would prevent Federal participation and assistance in the development of water resource projects which would have a direct and adverse effect on the values for which the rivers were designated and (2) it would require Federal land-managing agencies to reassess management policies, plans, regulations and contracts on lands adjacent to river segments, and to conform with the intent of Wild and Scenic River designation. Designation also would prohibit new mining claims on Federal lands within a quarter mile of designated segments classified as "wild." Impacts of Federal designation are summarized in Section IV of this SID and in Section II of the FEIS (see particularly excerpted pp. S-12 to S-15.) They are discussed in detail in Section IV of the FEIS. (Refer especially to pp. IV-158 to IV-172.)

The Heritage Conservation and Recreation Service is responsible for processing applications under Section 2(a)(ii) of the Act. Four steps were undertaken:

(1) Evaluation of the rivers to determine if they meet the criteria of the National System;

(2) An evaluation of the State's plan for permanently administering the rivers and related land resources (except on Federal lands) to assure protection of the values which may make them eligible for the National System;

(3) Compliance with the National Environmental Policy Act; and

(4) Consultation with the heads of Federal departments and agencies which would be affected by the proposal.

The results of steps one, two and three are incorporated in this SID. (See attachments). The issues of the eligibility of the rivers for the National System and the adequacy of the State's ability to permanently administer the rivers are addressed briefly in Section III and in detail in the incorporated documents.

In preparing the environmental impact statement the Heritage Conservation and Recreation Service led a Federal/State Task Force through which California's Resources Agency had a major input. Within Interior, substantial contributions were made by Water and Power Resources Service, Fish and Wildlife Service and the Bureau of Land Management. Input was also received from the Solicitor's Office, Office of Environmental Project Review, Indian Affairs and National Park Service. Outside Interior, the U.S. Forest Service, which is the principal

Federal lands manager in the area of the rivers proposed for designation, made major input, and the Corps of Engineers also cooperated.

The draft EIS was released on September 19 with the comment period originally scheduled to end November 5. This was extended through December 1 as a result of a court order. An attempt to gain a preliminary injunction by parties trying to delay processing the application was unsuccessful. Over 1,350 letters of comment were received during the 74-day review period. The final EIS was filed with EPA on December 12 and the 30-day waiting period began on December 17 when a Notice of Availability appeared in the *Federal Register*. Complete distribution of the FEIS was achieved by December 17 when copies had been distributed to all interested parties.

After consulting with Federal agencies, only the Forest Service objects to designation of any of these rivers at this time. As shown on page S-5 of the FEIS, significant portions of three rivers are on National Forest lands. The Forest Service is conducting a comprehensive planning program which will not be completed on three forests involved until late 1981 and a fourth until 1983. They have stated that designation at this time is premature and interferes with their planning.

A great deal of controversy surrounds this application. The strongest opposition has been registered by the affected North Coast counties, the timber industry, water development (irrigation, municipal and industrial) interests and persons who feel California can "take care of its own resources." A great deal of support comes from those

who can be characterized collectively as the "environmental" interest. The latter are dubious about the State's long-term ability to retain its State Wild and Scenic Rivers System as currently constituted and feel that Federal designation is a necessary step to ensure adequate protection of the total river systems.

II. Legal Issues

The controversy associated with this application has generated lawsuits in State and Federal courts. In *County of Del Norte v. Brown* the validity of the Governor's application was challenged under California law. In his decision, the judge refused to enjoin the application on the ground that judicial interference in this action of the State Executive would be contrary to the separation of powers doctrine. He set forth his opinion, however, that under State law the Secretary for Resources could not guarantee to "permanently administer" these river segments until general management plans have been approved legislatively. The Federal interpretation of the permanent administration requirement, he further indicated, must be made by the Department of the Interior. As Section III.B. of this document points out, the Congressional intent behind the permanent administration requirement is satisfied by the application.

Two lawsuits have been filed in Federal court. The first suit, initiated by several timber interests and North Coast counties, was filed on October 22, 1980. On December 1, 1980, the plaintiff's motion requesting an extension of the comment period was denied. In reaching this decision, the judge stated that full relief would be available after the Secretary had reached an "ultimate decision" on the application. An additional hearing on the issues presented in

this suit is scheduled for the week of January 12. At this hearing, plaintiffs will challenge the validity of the Governor's application in the absence of general management plans and the Department's compliance with the CEQ regulation concerning distribution of the FEIS. The Department will argue that these issues are not justiciable until a final decision has been reached and that any regulatory violation which has occurred is trivial and without legal effect.

The second lawsuit, filed on January 7, 1981, by several water development interests and North Coast counties, presents many of the same issues as the October 22 complaint. In addition, however, this suit attacks the adequacy of the FEIS and the validity of the procedures by which it was prepared and issued. No hearing has been scheduled on this complaint.

The significant legal issues which are presented by the lawsuits are as follows:

1. Does the State's application satisfy the permanent administration requirement of the Act if the State has not submitted legislatively approved management plans?

2. If the Act does not require management plans, is the application nonetheless deficient as a result of the State court decision that the Secretary for Resources cannot guarantee to permanently administer the rivers?

3. Did HCRS act unlawfully by changing its Procedures and Criteria and applying the revised standards to this application?

4. Are the draft and final environmental impact statements inadequate? Was the FEIS prepared in an unlawful manner?

5. Did the Department violate CEQ guidelines by failing to accomplish complete distribution at the time the FEIS was filed with EPA?

Although strong arguments to the contrary have been presented, it can be forcefully maintained the State Wild and Scenic Rivers Act and the corollary authorities and general management practices identified in the State's application satisfy the Congressional intent of the permanent administration requirement. The California application would, of course, be stronger if the State had approved management plans, assigned final classifications to all river segments, and established boundaries for the river corridors. Nonetheless, the application is defensible and, as the findings set forth below conclude, in compliance with the requirements of the Act.

Concerning the challenge to the change of the HCRS Procedures and Criteria, it is well established that an agency has the discretion to alter its procedures. The public was fully informed of the proposed HCRS change and its applicability to the California application, and the revised standards were published in the DEIS. In addition, the revised Procedures and Criteria were in full effect on September 16, 1980, one day prior to the formal acceptance of the California application.

Both the draft and the final environmental impact statements are adequate and present sufficient information to provide for a well reasoned decision. Finally, although HCRS may have violated CEQ regulations by failing to

distribute the FEIS concurrently with submission of the document to EPA, any such violation constitutes trivial, harmless error since the full 30-day review period has been provided.

In conclusion, it is certain that any designation action will be subject to a serious legal challenge. There is a possibility that the Court will view the application and the Department's review procedures as legally deficient. The most serious legal vulnerabilities of the application review process are the sufficiency of the petition in the absence of management plans and the adequacy of the FEIS. These risks should be considered before a final decision is reached.

III. Summary of Findings of Eligibility and the State's Ability to Permanently Administer the Rivers

A. Findings of Eligibility

The application has been reviewed under the criteria of the Act, Department of the Interior/Agriculture Guidelines, and HCRS Instruction 8010.1—Procedures and Criteria for Designating State Administered Rivers.

Of the 4,006 river miles proposed for designation by the Governor of California, 1,246 river miles or about 31 percent meet the criteria and are eligible for inclusion in the National System. Found ineligible are 3,600 feet of the Klamath River, located below Iron Gate Dam and within an FERC project boundary, and 2,760 miles of the smaller tributaries of the Smith River System.

All the applicable segments of the Klamath, Trinity, American and Eel Rivers have been determined to have outstandingly remarkable anadromous fishery values. In the Smith River basin, the mainstem and a number of

tributaries were found to possess potentially high or very high quality anadromous fish habitat and, therefore, were found to qualify. These tributaries are named on page P-5 of the FEIS and on page I-6 of the Evaluation Report. In addition to fishery values, the lower American River was found to possess outstandingly remarkable recreation values and the Middle Fork Eel and North Fork Smith were found to possess outstandingly remarkable whitewater values.

Further reference to eligibility may be found in the Eligibility Report. Also, Appendix D of the FEIS provides the manner in which the river segments would be classified in the National System if they are designated by the Secretary.

B. Findings of the State's Ability to Permanently Administer the Rivers

The California Wild and Scenic Rivers Act requires that the Resources Agency develop management plans for the rivers and submit them to the State legislature for approval. No river has an approved management plan to date, and this has raised serious questions (a major point in lawsuits against the Federal and State governments) as to whether there is assurance that the rivers will be "permanently administered" by the State. Nevertheless, the State has asserted that considerable protection is afforded these rivers where they flow across State and private lands. After review of applicable California legal authorities and existing management practices, a finding has been made that the State has provided the required commitment to permanently administer the rivers, has demonstrated a present ability to accomplish this end through an existing

administrative framework, and has the necessary legal authority to achieve such protection. This finding is likely to be subjected to legal challenge. Strong arguments have been made that this standard has not been satisfied, and the courts may resolve the issue against the Department.

The primary protection of river values is provided by the California Wild and Scenic Rivers Act—particularly by requiring all State and local governmental agencies to exercise their powers in a manner consistent with the Act and by prohibiting State and local governmental units from constructing or assisting in the construction of water resource development projects having an adverse effect on the free-flowing condition or natural character of the rivers. Other legal authorities are the California Environmental Quality Act, the Public Trust Doctrine, the California Forest Practice Rules and the Porter-Cologne Water Quality Control Act. All of these provide the legal framework for permanent State administration and serve as additional authority for State and local agencies to control activities on private lands.

Reference to State legal authorities and their application to permanent management and protection of the rivers is contained in the Evaluation of State Management Ability Report and in Appendix E of the FEIS. The requirement that the State complete river management plans under the California Wild and Scenic Rivers Act would not change with Federal designation. These plans would still have to be approved by the California legislature before any of their provisions requiring additional legal authorities could become effective.

C. Findings on State Designation of Rivers

The "State designation" requirement of the Act is satisfied by the California Wild and Scenic Rivers Act itself which provides such designation for the rivers included in this proposal. A frequently raised legal issue is the effect of the State's failure to adopt permanent classifications—wild, scenic or recreational—for any of the rivers in its system*. As has been noted above, classification is not a requirement of Section 2(a)(ii). Nonetheless, preliminary classifications have been adopted by the State for all except the Smith River System where many of the eligible tributaries have not been preliminarily classified. Those tributaries which have been found eligible and which have received preliminary classification are:

—North Fork Smith River
—Middle Fork Smith River
—Hardscrabble Creek from the north boundary of Section 2, T17N, R11E to the confluence with the Middle Fork Smith
—Patrick Creek
—Monkey Creek
—Siskiyou Fork Smith River
—South Siskiyou Fork Smith River
—South Fork Smith River from the east boundary of Section 15, T16N, R4E to Blackhawk Bar and from Blackhawk Bar to the confluence with the Middle Fork
—Craigs Creek
—Coon Creek
—Gordon Creek

*Note: For purposes of the National System, HCRS has determined the appropriate classifications as shown in the attached Evaluation Report.

Appendix 2

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20430

December 12, 1980

Dated: 12/12/80

The US Environmental Protection Agency has received the

☐ Draft ☒ Final ☐ Supplemental

Environmental Impact Statement prepared by the (Agency) USDI Heritage Conservation and Recreation Service entitled Proposed Designation of Five California Rivers in the National Wild and Scenic Rivers System. The above document has been handcarried to the USEPA for official filing purposes by the undersigned. The undersigned also verifies that complete distribution to all Agencies/persons has been made simultaneously with this filing.

/s/ JOHN HAUBERT

Name of Person Filing EIS

OUTDOOR RECREATION PLANNER

Title

343-4793

Telephone Number

Appendix 3

40 C.F.R. § 6.401(a)

NEPA PROCEDURES

§ 6.401 Official filing requirements.

(a) *General.* OFA is responsible for the conduct of the official filing system for EISs. This system was established as a central repository for all EISs which serves not only as means of advising the public of the availability of each EIS but provides a uniform method for the computation of minimum time periods for the review of EISs. OFA publishes a weekly notice in the Federal Register listing all EISs received during a given week. The 45-day and 30-day review periods for draft and final EISs, respectively, are computed from the Friday following a given reporting week. Pursuant to 40 CFR 1506.9, responsible officials shall comply with the guidelines established by OFA on the conduct of the filing system.

Appendix 4

Federal Register/Vol. 44, No. 156
Friday, August 10, 1979/Notices

ENVIRONMENTAL PROTECTION AGENCY

[FRL 1294-5]

Availability of Environmental Impact Statements

AGENCY: Office of Environmental Review, Environmental Protection Agency.

PURPOSE: This Notice lists the Environmental Impact Statements which have been officially filed with the EPA and distributed to Federal Agencies and interested groups, organizations and individuals for review pursuant to the Council on Environmental Quality's Regulations (40 CFR Part 1506.9).

PERIOD COVERED: This Notice includes EIS's filed during the week of July 30 to August 3, 1979.

REVIEW PERIODS: The 45-day review period for draft EIS's listed in this Notice is calculated from August 10, and will end on September 24, 1979. The 30-day wait period for final EIS's as calculated from August 10, 1979 will end on September 10, 1979.

EIS AVAILABILITY: To obtain a copy of an EIS listed in this Notice you should contact the Federal agency which prepared the EIS. This Notice will give a contact person for each Federal agency which has filed an EIS during the period covered by the Notice. If a Federal agency does not have the EIS available upon request you may contact the Office of Environmental Review, EPA for further information.

BACK COPIES OF EIS'S: Copies of EIS previously filed with EPA or CEQ which are no longer available from the originating agency are available from the Environmental Law Institute, 1346 Connecticut Avenue, Washington, D.C. 20036.

FOR FURTHER INFORMATION CONTACT: Kathi Weaver Wilson, Office of Environmental Review (A-104), Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, (202) 245-3006.

SUMMARY OF NOTICE: On July 30, 1979, the CEQ Regulations became effective. Pursuant to Section 1506.10(a), the 30 day wait period for final EIS's received during a given week will now be calculated from Friday of the following week. Therefore, for all final EIS's received during the week of July 30 through August 3, 1979, the 30 day wait period will be calculated from August 10, 1979. The wait period will end on September 10, 1979.

Appendix I sets forth a list of EIS's filed with EPA during the week of July 30 to August 3, 1979 the Federal agency filling the EIS, the name, address, and telephone number of the Federal agency contact for copies of the EIS, the filing status of the EIS, the actual date the EIS was filed with EPA, the title of the EIS, the State(s) and County(ies) of the proposed action and a brief summary of the proposed Federal action and the Federal agency EIS number if available. Commenting entities on draft EIS's are listed for final EIS's.

Appendix II sets forth the EIS's which agencies have granted an extended review period or a waiver from the prescribed review period. The Appendix II includes the

Federal agency responsible for the EIS, the name, address, and telephone number of the Federal agency contact, the title, State(s) and County(ies) of the EIS, the date EPA announced availability of the EIS in the Federal Register and the extended date for comments.

Appendix III sets forth a list of EIS's which have been withdrawn by a Federal agency.

Appendix IV sets forth a list of EIS retractions concerning previous Notices of Availability which have been made because of procedural noncompliance with NEPA or the CEQ regulations by the originating Federal agencies.

Appendix V sets forth a list of reports or additional supplemental information on previously filed EIS's which have been made available to EPA by Federal agencies.

Appendix VI sets forth official corrections which have been called to EPA's attention.

Dated: August 7, 1979.

William N. Hedeman, Jr.,
Director, Office of Environmental Review.

Appendix 5

45 Fed. Reg. 83,031

(12-17-80)

Heritage Conservation and Recreation Service

[INT FES 80-53]

Availability of Final Environmental Impact Statement

AGENCY: Heritage Conservation and Recreation Service, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given that pursuant to Section 102(2)(c) of the National Environmental Policy Act, the Heritage Conservation and Recreation Service (HCRS) has prepared a Final Environmental Impact Statement for a proposal to add five rivers of the California Wild and Scenic Rivers System to the National System. Notice of Availability of the draft environmental statement inviting comments was announced in the Federal Register on September 19, 1980, and September 23, 1980 (DES 80-59).

DATE: No final decision will be made on this proposal until thirty days from publication of a Notice by the Environmental Protection Agency.

ADDRESS: Copies are available for inspection at the following locations:

Heritage Conservation and Recreation Service, Pension Building, Room 203, 440 G Street, NW., Washington, D.C., 20243, Heritage Conservation and Recreation Service, Pacific Southwest Regional Office, 450 Golden Gate Avenue, P.O. Box 36062, San Francisco, California 94102

A limited number of single copies are available and may be obtained by writing the above offices. The Pacific Southwest Regional Office also can provide a list of library facilities in California where the statement may be read.

SUPPLEMENTARY INFORMATION: Pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(c)), this document analyzes the significant environmental impacts of adding five California Wild and Scenic Rivers—the Klamath, Eel, Trinity, Smith and lower American—to the National System. The rivers would remain under State administration except for any Federal lands involved. Beneficial impacts would include preservation of natural and recreational values associated with the free-flowing condition of the rivers. Adverse impacts would include loss of timber production, tax revenue, jobs, and the possible economic benefits associated with water resource development projects which would be foregone.

The primary author of this notice is John Haubert, Heritage Conservation and Recreation Service, Department of the Interior, Washington, D.C. 20243.

Dated: December 11, 1980.

Chris T. Delaporte,
Director, Heritage Conservation and Recreation Service.

Appendix 6

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Land and Natural Resources Division
Washington, D.C. 20530

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-81-0567WAI

County of Del Norte, et al.
Plaintiffs,
v.
United States of America, et al.
Defendants.

No. C-81-1457WAI

Association of California Water Agencies, et al.
Plaintiffs,
v.
United States of America, et al.
Defendants.

[Filed June 1, 1981]

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

IV.

THE SECRETARY DID NOT ACT UNTIL MORE THAN 30 DAYS HAD PASSED FROM THE TIME PLAINTIFFS RECEIVED COPIES OF THE FEIS AND THE PUBLIC RECEIVED NOTICE OF ITS AVAILABILITY IN THE FEDERAL REGISTER

Plaintiffs argue that the Secretary's decision to approve the Governor's request to include portions of five state-designated wild and scenic rivers in the System was fatally premature under CEQ regulations, which prescribe a 30-day waiting period from the date on which a FEIS is filed with the EPA and the date on which a federal decision-maker may act. The Secretary's failure to comply with the 30-day waiting period is based on a literal reading of CEQ's regulations, 40 C.F.R. 1506.9 and 1506.10.

Section 1506.9 states that EISs "shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public."

Section 1506.10 states:

> (a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements *filed* during the *preceding* week. The minimum time periods set forth in this section shall be calculated from the date of the publication of this notice.
>
> (b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:
>
> • • •
>
> (c) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement. (Emphasis added.)

The facts here show that on Friday, December 12, 1980, an employee of the Heritage Conservation and Recreation Service of Interior (HCRS) delivered the FEIS to the EPA in Washington, D.C. On that date he signed a form receipt verifying that "complete distribution to all Agencies/persons has been made simultaneously with the filing." This was not true. HCRS had no copies available on that date. Copies of the FEIS were not made available to the public until Monday, December 15, 1980. Two days later, on December 17, plaintiffs' counsel actually received a copy of the FEIS. That same day a Notice of Availability of the FEIS was published in the Federal Register.

Plaintiffs argue that "in accordance with Sections 1506.9 and 1506.10, the Federal Register Notice of Availability could have been published no earlier than the Monday of the following week, December 22, 1980." They conclude that the 30-day period would have expired January 21, 1981, two days after the Secretary made his decisions (and after Mr. Andrus was no longer in office). (Plaintiffs' memo in support of summary judgment 44-45). The Chairman and Acting General Counsel of CEQ both explained that the purpose of CEQ's regulations is to insure that interested parties have 30 days in which to comment on a proposed action. Chairman Gus Speth has declared, "[t]he purpose of 40 C.F.R. §§ 1506.9 and 1506.10(b)(2) would be satisfied if a final EIS is available for public review for 30 days following publication of a *Federal Register* EIS notice." Speth Declaration, ¶ 5. See Affidavit of Foster Knight, ¶ 2. Speth further explained that the "preceding week" phrase used in Section 1506.10 is not intended to enlarge the 30-day period that Section provides for public and agency review of final EISs. Speth also stated that the phrase is not intended "to prevent EPA from publishing a • • •

Appendix 7

4 CRS
U.S. Department
of the Interior
Heritage Conservation
and Recreation Service

NEWS RELEASE
Pacific Southwest Region
P.O. Box 36062
San Francisco, CA 94102

For Release: December 15, 1980

FINAL ENVIRONMENTAL IMPACT STATEMENT AVAILABLE ON INCLUSION OF FIVE CALIFORNIA RIVERS IN THE NATIONAL WILD AND SCENIC RIVERS SYSTEM

A final environmental impact statement (FEIS) on the proposed inclusion of five State-designated wild and scenic rivers in the National Wild and Scenic Rivers System has been prepared by Interior's Heritage Conservation and Recreation Service (HCRS) and is available to the public.

The FEIS was prepared in response to the Governor of the State of California's petition to the Secretary of the Interior that these rivers be designated as components of the National Wild and Scenic Rivers System. The five rivers in the Governor's request include portions of the Klamath, Trinity, and Eel River systems; the Smith River and all its tributaries; and a segment of the Lower American River.

Inclusion of the rivers in the National System would, among other things, prohibit federal construction, assistance, or licensing of water resource projects that would adversely affect the rivers. It would also require federal agencies managing lands along designated rivers to manage those lands in a manner which protects the values for which the rivers were designated.

A draft of the environmental impact statement was released for review and comment on September 19, 1980. A series of public meetings was held in California in October to receive comments. Comments received through December 5, 1980 have been taken into account in preparing the final document.

A limited number of copies of the FEIS are available from: The Heritage Conservation and Recreation Service Division of Natural Resources Systems Planning, 440 G Street, N.W., Room 203, Washington, D.C. 20243, Phone 202/343-4793, Attention John Haubert and from Heritage Conservation and Recreation Service, 450 Golden Gate Avenue, P.O. Box 36062, San Francisco, California 94102, Phone 415/556-8313, Attention Bob Van Etten. The San Francisco office can also provide a list of libraries in California where the FEIS may be read.

Appendix 8

DEPARTMENT OF AGRICULTURE
Office of the Secretary
Washington, D.C. 20250

12 Jan 1981

Honorable Cecil D. Andrus
Secretary of the Interior
Washington, DC 20240

Dear Mr. Secretary:

We have completed our review of the Final Environmental Impact Statement entitled "Proposed Designation of Five California Rivers in the National Wild and Scenic Rivers System." The preferred alternative, Alternative E, if implemented, would designate 1,246 river miles determined to be eligible for the National System. The majority of these river miles lie within National Forests.

The proposal would likely have major impacts on outputs from the National Forests in northern California. The impacts on the timber resources and the resultant impact on the local economy are assessed in some detail in the statement. However, the impacts on the multiple resources of the National Forest lands could not be adequately assessed in the abbreviated time used for preparing the draft and final environmental impact statements.

Throughout the statement there is an inference that the primary purpose for designating the rivers is the protection and enhancement of the anadromous fishery. Since protection and enhancement of anadromous fishery values have been and will continue to be of high priority in the management of National Forest System lands, designating the

rivers without a clear picture of the impacts, costs, and benefits from such designation is premature. The impacts could be far greater than were possible to ascertain in the limited time for analysis. Designation and classification of the rivers may foreclose the opportunity to develop the necessary road system to assure protection and management of all the Forest resources.

The planning now under way on the National Forest System lands, in accordance with the National Forest Management Act of 1976, will comprehensively examine all resources tributary to the rivers in context with the adjacent public and private lands. Any action to fragment the decision resulting from the Forest planning process would be premature and undesirable.

There is no identified imminent threat to the freeflowing values of the rivers. During the land management planning period, the Forest Service is committed to protecting those rivers which are deemed eligible for inclusion in the National System. Decisions as to their designation into the System will result from the Forest planning process.

I request that you exclude from designation those segments of the Klamath, Smith, Eel, and Trinity Rivers within the National Forests should you decide to proceed with any designation.

Sincerely,

/s/ BOB BERGLAND

Bob Bergland
Secretary

Appendix 9

PILLSBURY, MADISON & SUTRO
ALSON R. KEMP, JR.
JAMES L. WARREN
KENNETH E. CHYTEN
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000
Attorneys for Plaintiffs

United States District Court for the
Northern District of California

No. C-80-3964 W.A.I.

County of Del Norte, et al.,
Plaintiffs,
vs.
Cecil D. Andrus,
Secretary of the Interior, et al.,
Defendants.

DECLARATION OF
GERALD D. COCHRAN

I, GERALD D. COCHRAN, do hereby declare as follows:

1. I am the duly elected County Assessor for Del Norte County, California. I have served in this capacity since January 1971, and will complete my third term as County Assessor in January 1983. Since 1976, I have served on the Timber Advisory Committee, a nine (9) member Board appointed by the State Board of Equalization to set rates on standing timber and to formulate policies and proce-

dures for the Timber Yield Tax Division of the State Board of Equalization. In 1979 I served as President of the California Assessor's Association, the sole statewide organization of California County Assessors.

2. In my capacity as County Assessor, I am responsible for valuing real and personal property within Del Norte County for the purpose of implementing taxes authorized by the California State Constitution. I also function as advisor to the Board of Supervisors on matters that impact on County revenues. In addition, I was appointed in 1978 by the Board of Supervisors as the Chairman of a committee responsible for reviewing pending State legislation or other State and Federal actions and determining their potential impact on Del Norte County.

3. In accordance with these responsibilities, I am working with other Del Norte County officials, particularly the Director of Planning and the County Counsel, to review and comment upon the Environmental Impact Statement ("EIS") prepared with respect to the request by California Governor Edmund G. Brown, Jr. ("Governor Brown") that certain California rivers be placed within the National Wild and Scenic Rivers System ("the National System"). Together with the County Director of Planning, Ernest W. Perry, I appeared at all four (4) scoping sessions and gave testimony at the scoping hearings held in San Francisco, Los Angeles and Fresno. The purpose of these scoping hearings was to allow comment on the matters which should be included in the proposed EIS. In my testimony, I protested the short time allowed to prepare comments on the proper scope of an EIS prepared with respect to an action as large and complex as that requested by Governor Brown

—less than two (2) weeks, from August 7, 1980 to August 20, 1980. Other persons testifying at the scoping hearings also protested the short time allowed.

4. I first had access to a copy of the draft EIS on or about September 23, 1980. As County Assessor and Chairman of the County Legislative Committee, I immediately began reviewing the draft EIS in an attempt to determine whether it adequately considers the short and long term impact of the proposed action upon the County tax base. I estimate that I have spent in excess of ninety (90) hours reviewing the draft EIS and discussing it with other Del Norte County officials as well as other interested groups such as the Del Norte Resources Alliance.

5. Despite this effort, I have not been able to make this determination. Until I am able to develop detailed models of the potential effect of the proposed action on property, excise and sales taxes, as well as in lieu license fees and other taxes, I can not meaningfully analyze or comment upon the conclusion reached in the draft EIS that increased tourism would offset any decrease in the tax base. For example, the value of sawmills for the purposes of calculating property taxes depends upon the timber inventory available for processing in that mill. This inventory may vary on which of the eight (8) alternatives discussed in the draft EIS is adopted. Furthermore, within each alternative different classifications—Wild, Scenic, or Recreational—may be adopted. Each such classification would have a different effect upon the timber inventory available for each mill. Thus, I have to construct many different models based on varying assumptions.

6. Taxes for sawmills and related equipment and land alone account for approximately 10% of all locally collected taxes. In total sixty-two percent of the locally collected property taxes, including the Timber Yield Tax, are derived from timber and timber industrial sites. Moreover, the amount of tax revenue collected locally ultimately depends upon the level of the county's economic prosperity. For example, the taxes collected on motels and restaurants depend upon annual sales, which in turn depend upon variables such as the employment level.

7. In my opinion, the potential impact of the proposed action upon the level of economic prosperity in Del Norte County, and hence on locally collected tax revenues, could well be devastating. Unfortunately, I do not have any staff available to assist me in carrying out the studies necessary to intelligently estimate the extent and nature of this impact. I estimate that, working together with Ernest Perry, Planning Director, it would take at least three (3) additional months to complete a preliminary analysis. I cannot complete an analysis of sufficient sophistication to comment meaningfully on the draft EIS by November 25, 1980.

Executed under penalty of perjury, November 20, 1980 in Crescent City, California.

/s/ GERALD D. COCHRAN

GERALD D. COCHRAN

Appendix 10

CALIFORNIA LEGISLATURE
State Capitol
Sacramento, California

[Seal]

August 18, 1980

The Honorable Cecil Andrus, Secretary
United States Department of the Interior
Washington, D.C.

Dear Mr. Secretary:

The Governor of California has recently requested that you act to include a number of rivers on the North Coast of California in the National Wild and Scenic Rivers System pursuant to the provisions of Section II (a) (ii) of Public Law 90-542. The purpose of this letter is to express our objections, as members of the California State Assembly, to the placement of these rivers in the national system.

The California Legislature in 1972 acted to include a number of California rivers in a state-administered Wild and Scenic Rivers System but reserved to itself judgement as to how these rivers and their related land resources were to be managed in the future. The Legislature has authorized and funded detailed management studies of these river systems and has mandated that the results of the studies be reported to the Legislature for approval before they can become effective or be implemented. To date, none of the plans have been approved, and only two have been submitted for legislative review.

In our judgement the current efforts to place these rivers in the national system is, at best, premature. It is our de-

sire that the administration of our wild rivers be conducted under state law and that the control of such systems and the water resources of this state remain with the Legislature and people of the State of California. Therefore, it is respectfully requested that you take no action to place additional California rivers in the National Wild and Scenic Rivers System in the absence of a specific request for such action by the California Legislature.

Sincerely,

DOUGLAS H. BOSCO

DHB:jan

Assembly

Douglas H. Bosco
Stan Statham
David G. Kelley
William H. "Bill" Ivers
G.N. Felando
Dan Boatwright
Don Rogers
Dave Stirling
Bill Leonard
Carmen Perino
Norm Waters
John E. Thurman
Walter M. Ingalls
Robert C. Frazee
Jim Costa
Carol Hallett
Bob Naylor
Robert C. Cline
Richard Lehman
Alister McAlister
Richard Robinson
Dennis Brown
Paul T. Bannai
Charles R. Imbrecht
Marian Bergeson
Bruce Young
Bruce Nestande
Teresa P. Hughes
Tom Bane
Gwen Moore
R.L. Mountjoy
Patrick J. Nolan
Dave Elder
Mike Roos
Chet Wray
Bill McVittie
Phil Wyman
Leroy F. Greene
Sally Tanner
Frank Vicencia
Thomas M. Hannigan
Richard Alatorre
Maxine Waters
Jim Ellis
Gene Chappie

Assembly—(Continued)

Gordon Duffy
Bill Lancaster
Marilyn Ryan
Willie L. Brown, Jr.
Ross Johnson
Herschel Rosenthal
J. Robert Hayes
Art Torres
Leo T. McCarthy
John T. Knox
Paul Priolo

Senate

Barry Keene
Ruben S. Ayala
David A. Roberti
Alex P. Garcia
Ken Maddy
Ralph C. Dills
Paul Carpenter
Walter W. Stiern
Alfred E. Alquist
Alan Robbins
John R. Garamendi
Robert Presley
Rose Ann Vuich
Joseph B. Montoya
Bill Greene
Ray Johnson
Marz J. Garcia
Dan O'Keefe
John G. Schmitz
Ollie Speraw
William Campbell
Robert P. Nimmo
William A. Craven
Lou Cusanovich
Newton Russell
John Holmdahl
John V. Briggs
Robert G. Beverly
Jim Nielsen
H.L. Richardson
Diane Watson

Office-Supreme Court, U.S.
FILED
DEC 27 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 84-544 and 84-553

In the Supreme Court of the United States

OCTOBER TERM, 1984

ASSOCIATION OF CALIFORNIA WATER AGENCIES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF DEL NORTE, CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

WILLIAM M. COHEN
JANICE SIEGEL
JACQUES B. GELIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether alleged procedural irregularities in the timing of the Secretary of the Interior's designation of parts of five northern California rivers as components of the national Wild and Scenic Rivers System required setting aside the designation notwithstanding petitioners' inability to demonstrate any prejudice flowing from the alleged irregularities.

2. Whether the Secretary of the Interior correctly determined that the State of California would be able to "permanently administer[]" the rivers as wild, scenic, or recreational, as required by the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii).

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-544

ASSOCIATION OF CALIFORNIA WATER AGENCIES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 84-553

COUNTY OF DEL NORTE, CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCU[illegible]

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10)[1] is reported at 732 F.2d 1462. The opinion of the district court (Pet. App. A21-A34) is not reported.

---

[1] "Pet. App." refers to the appendix to the petition in No. 84-544.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1984. A petition for rehearing was denied on July 5, 1984 (Pet. App. A11). The petition for a writ of certiorari in No. 84-544 was filed on October 2, 1984, and the petition for a writ of certiorari in No. 84-553 was filed on October 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge by several California counties and entities representing timber and water development interests to the Secretary of the Interior's designation of portions of five northern California rivers as components of the national Wild and Scenic Rivers System.

1. a. In 1968, Congress enacted the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, declaring "that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations" (16 U.S.C. 1271). To preserve these rivers in their natural free-flowing condition, the Act forbids any department or agency of the United States from assisting "in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established" (16 U.S.C. 1278(a)). The Act also directs the heads of all federal agencies to "take such action * * * as may be necessary to protect such rivers in accordance with the purposes of [the Act] * * *. Particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of [the Act]" (16 U.S.C. 1283(a)). In establishing this protective scheme, Congress expressed

its commitment to the principle that "just as the Nation has set aside some of its land areas in national parks, national monuments, national historic sites, and the like, so some of its streams which have exceptional values * * * — scenic, recreational, esthetic, and scientific — ought to be preserved for public use and enjoyment." H.R. Rep. 1623, 90th Cong., 2d Sess. 3 (1968).

Rivers may be designated as part of the system in two ways. Section 2(a)(i) of the Act, 16 U.S.C. 1273(a)(i), provides that Congress may designate rivers for inclusion in the system. Alternatively, Section 2(a)(ii) of the Act, 16 U.S.C. 1273(a)(ii), authorizes the Secretary of the Interior to designate rivers for inclusion in the system. Before the Secretary may designate a river under Section 2(a)(ii), he must find that (1) the river has been designated by the state legislature as wild, scenic, or recreational; (2) the river is to be "permanently administered" as wild, scenic, or recreational "by an agency or political subdivision of the State"; and (3) the river meets the criteria set forth in the Act for classification as wild, scenic, or recreational "and such criteria supplementary thereto as [the Secretary] may prescribe" (16 U.S.C. 1273(a)(ii)).

b. In 1972, the California legislature, at the request of the Governor of California, gave state protection to five northern California rivers. Cal. Pub. Res. Code § 5093.54 (West Supp. 1984). By designating these rivers as wild, scenic, or recreational, the California legislature expressed its intent that they "shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state." Cal. Pub. Res. Code § 5093.50. In order that the preservation mandate might be fulfilled, the California legislature imposed a number of permanent protective restrictions on the rivers. The legislature undertook to maintain the free-flowing character and outstanding anadromous fishery values of the

rivers by prohibiting all dams, reservoirs, diversions, and other water impoundment facilities. Cal. Pub. Res. Code § 5093.55. The legislature also enacted a "consistency clause" under which all state and local agencies are required to exercise their powers "in a manner consistent with the provisions" of the state statute. Cal. Pub. Res. Code § 5093.61. By taking this action, the legislature guaranteed that the full panoply of state environmental laws (*e.g.*, California Coastal Act, California Environmental Quality Act, California Forest Practices Act, Porter-Cologne Water Quality Act) would be applied by each state and local agency to preserve the wild, scenic, and recreational characteristics of these rivers.

On July 18, 1980, the Governor of California filed an application to place 4,006 river miles of these five rivers in the federal Wild and Scenic Rivers System. On August 1, 1980, the Secretary of the Interior acknowledged receipt of the Governor's application and indicated that it would have to be supported by, among other things, "a practical plan which meets criteria of the [federal] Wild and Scenic Rivers Act for protection and administration of each of the rivers and their related land resources * * *." DX 16, at 1. To fulfill this requirement, the State submitted an extensive report, over 100 pages long, that explained in detail the administrative capabilities of California's state and local agencies. In this document, the State explained how it would satisfy the federal requirement (16 U.S.C. 1273(a)(ii)) that the rivers be "permanently administered" as wild, scenic, or recreational.

2. On December 5, 1980, Judge Fred W. Marler, Jr. of the State Superior Court for Sacramento County issued a memorandum opinion in *County of Del Norte* v. *Brown*, No. 292019 (Pet. App. A182-A189). In that lawsuit, several California counties and California water interests — including some of the petitioners here — challenged the authority

of the Governor to submit the Section 2(a)(ii) application prior to the approval of river management plans by the California legislature. Judge Marler denied the plaintiffs' request to require the Governor to withdraw the Section 2(a)(ii) application, concluding that state law did not bar the Governor from submitting an application and that whether the rivers should be included in the federal system was a question of federal law (Pet. App. A186-A187). Although he refused to order the Governor to withdraw the application, Judge Marler wrote in dictum that, in the absence of legislatively-approved management plans, neither the Governor nor the State Resources Secretary had authority under state law to commit the State to permanently administer the rivers under the state wild and scenic rivers statute (*id.* at A186, A188). Recognizing that his interpretation on this point could in no way affect the Secretary's determination as to whether or not California's application met the federal standards of Section 2(a)(ii), Judge Marler qualified his dictum by emphasizing that "it is then the province of the Secretary of the Interior to find in accordance with the Court's interpretation of the California Act whether federal requirements for inclusion of these rivers in the national system have been met" (Pet. App. A187).

Judge Marler's opinion was analyzed by Department of the Interior officials and presented to the Secretary in at least five decisionmaking documents. The significance of Judge Marler's dictum was summarized in an 18-page review of California's ability to permanently administer the five rivers that was submitted to the Secretary as part of the final decision making package. Evaluation of California's Ability to Permanently Administer State Protected Rivers in Conformance with Federal Wild & Scenic River Legislation (DX 36) [hereinafter cited as *Evaluation*]. In concluding that California had demonstrated its ability to satisfy the "permanent administration" requirement of federal law, the *Evaluation* stated (at 2 (emphasis in original)):

> In addition to reviewing those authorities which were addressed in the State Court decision, our analysis has also considered the corollary authorities which are set forth in the State application. * * * We have considered in our analysis the entire body of California law providing the Resources Agency and other State and local agencies authority for protecting the resource values of the rivers nominated. *Our analysis indicates that the State's program of action adequately protects the rivers' values.*

3. After determining that a Section 2(a)(ii) designation based on the State's application would constitute a "major Federal action[]" requiring preparation of an environmental impact statement (EIS) pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), the Department of the Interior began to prepare a draft EIS on the proposal. A draft EIS was issued on September 16, 1980, and ten public hearings were held to obtain comments on that document. On November 14, 1980, at the behest of some of the petitioners, the district court issued a temporary restraining order extending the comment period on the draft EIS. *County of Del Norte* v. *Andrus*, No. C-80-3964-WAI (N.D. Cal.). The order was dissolved on December 1, 1980, for lack of jurisdiction, and the comment period was closed on December 5, 1980 (resulting in a comment period more than a month longer than the 45 days required by the regulations of the Council on Environmental Quality (see 40 C.F.R. 1506.10(c)).

On Friday, December 12, 1980, an Interior employee filed the final EIS (FEIS) with the Environmental Protection Agency and signed an EPA form verifying that distribution of that document had been completed. Copies of the FEIS were available on that date at Interior's offices in San Francisco and Washington, D.C., as well as at EPA's offices in Washington, D.C. Full distribution of the FEIS was

completed on Monday, December 15. By Wednesday, December 17, copies of the FEIS were available in quantity to the public, and copies were obtained by petitioners' counsel on that date. Also on that date, EPA published a Notice of Availability of the FEIS in the Federal Register. 45 Fed. Reg. 83031 (1980). Interior relied on the December 17 publication date for purposes of calculating the 30-day waiting period for final agency action imposed by 40 C.F.R. 1506.10(b)(2).

4. After two preliminary versions of a Secretarial Issue Document (SID) were distributed for review within the Department of the Interior, the final SID was issued on January 16, 1981. Former Secretary Cecil D. Andrus signed the decision option sheet of the SID (which had been given to him several days before) on January 19, 1981.[2] The Secretary's decision designated only 1,235 of the 4,006 river miles the Governor had proposed for inclusion in the national system. (Petitioners' statement (84-544 Pet. 2) that 2,400 river miles were placed in the System is incorrect.) Nearly three-fourths of the river mileage listed in the State's application was denied inclusion based on the Secretary's determination that it did not qualify under the eligibility requirements of the federal Act.

5. In early 1981, two substantially similar suits were filed by timber interests and water development interests — petitioners here — seeking to invalidate the Secretary's designation. Petitioners alleged that the Secretary's designation was invalid because (1) the FEIS was inadequate; (2) Interior had failed to follow two Council on Environmental Quality (CEQ) regulations, 40 C.F.R. 1506.9 and 1506.10,

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[2]On January 15 and 16, 1981, respectively, the United States District Courts for the Districts of Oregon and Northern California had enjoined the decisionmaking process. These injunctions were vacated by the Ninth Circuit on January 19, 1981 (Pet. App. A80-A81).

relating to the timing of EISs; and (3) the Secretary acted arbitrarily and capriciously in concluding that California had the ability to permanently administer the rivers as wild, scenic, or recreational rivers. The State of California and a number of environmental organizations were granted leave to intervene as defendants.

On February 9, 1983, the district court ruled in favor of petitioners, holding, inter alia, that the Secretary's designation was defective because of procedural irregularities (Pet. App. A21-A34). The court's basic holding was that the Secretary's decision was a nullity because he was not authorized to reach a decision on January 19, 1981. CEQ regulations provide for a 30-day waiting period between publication of the Notice of Availability of the FEIS in the Federal Register and final agency action. 40 C.F.R. 1506.10(b)(2). It is undisputed that 33 days actually elapsed between publication of the Notice of Availability and the Secretary's decision. The district court ruled, however, that the December 17 Federal Register notice was invalid because the notice should not have been published until the week of December 22. Thus, according to the district court's reasoning, the Secretary was barred by the 30-day waiting requirement from taking any action on the Governor's recommendation until January 21, 1981 (when his successor had assumed office). Pet. App. A24-A25.[3]

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[3]The district court's ruling that the timing of the Federal Register notice was improper rested on the court's conclusion that certain preconditions for publication of a Notice of Availability had not been satisfied as of December 17. The court relied, first, on Section 1506.9 of the CEQ regulations, which states in pertinent part:

> Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public.

As previously noted, a copy of the Final EIS was filed with EPA on December 12. However, the district court concluded that copies of the FEIS were not "available" to the public within the meaning of 40 C.F.R.

In addition, the district court ruled that petitioners were entitled to summary judgment on the issue of whether the Secretary had acted arbitrarily and capriciously in concluding that California could "permanently administer" the designated rivers as wild, scenic, or recreational rivers (Pet. App. A28-A31). The court acknowledged that the question of permanent administration was a matter of federal law, that it was within the Secretary's discretion to determine the adequacy of the State's ability to comply with the permanent administration requirement, and that the state court opinion had been brought to the Secretary's attention by the Secretarial Issue Document (*id.* at A29, A31). Nevertheless, the court held that the "full import [of the state court decision] was not set forth, and secretarial consideration may thereby have been unduly limited" (*id.* at A31).

6. The court of appeals reversed (Pet. App. A1-A10). The court first held that "any violation of [CEQ's timing regulations, 40 C.F.R. 1506.9 and 1506.10] must be regarded as insignificant and within the scope of another portion of the same series of regulations which provides that trivial violations shall not form the basis for independent causes of

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1506.9 until the mailing of the Final EIS to all those on the Interior Department's mailing list was completed on December 15. Thus, according to the district court, the Final EIS was not effectively filed with EPA until December 15.

The district court also cited the following language from Section 1506.10 of the CEQ regulations:

> The Environmental Protection Agency shall publish a notice in the Federal Register each week of the environmental impact statements filed during the preceding week.

The district court ruled that this section creates a mandatory requirement that the EPA delay publication of the Federal Register notice until the week following the effective filing date. Since effective filing purportedly did not occur until December 15, the court concluded that publication of the Federal Register notice should have been delayed until the week of December 22.

action. 40 C.F.R. § 1500.3 (1983)" (Pet. App. A2-A3). At the outset, the court noted (*id.* at A2 (footnote omitted)):

> It is apparent from the record that the State of California, which originally proposed the designation, and the Heritage Conservation and Recreation Service (HCRS), the Department of the Interior division which processed the application, favored expeditious completion of all NEPA requirements so that action could be taken on the proposal before the Carter administration left office. It is equally apparent that those opposing designation, including [petitioners] in this case, wished to delay final consideration by the Secretary until the new President took office.

The court of appeals then reviewed the chronological facts relevant to the EIS process. These facts showed that "the agency followed all timing requirements for preparation of the EIS itself"; that the comment period on the draft EIS was substantially longer than required by CEQ's regulations; that the Notice of Availability of the FEIS was accurate when it appeared on December 17 because the FEIS was then available; and that more than the 30 days required by 40 C.F.R. 1506.10(b)(2) had passed when the Secretary designated the rivers on January 19, 1981 (Pet. App. A5). In light of these facts, the court of appeals concluded (*id.* at A7):

> The integrity of the decision making process within the government and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way.

In addition, the court of appeals rejected the district court's conclusion that the Secretary had not been fully apprised of the state court decision that the rivers could not, under state law, be "permanently administered" as wild, scenic, or recreational. The court of appeals summarized its conclusion as follows (Pet. App. A10):

> Full review of the record reveals * * * that the [state court] decision was both paraphrased in a memorandum to the Secretary and attached in full as an addendum to that memorandum. The Secretarial Issue Document noted the state court opinion, but concluded that sufficient other state law protections existed to satisfy the permanent administration requirement under the federal act. The record thus belies the contention that the state court opinion was not considered. In the absence of clear evidence to the contrary, courts presume that public officers properly discharge their duties, including reading memoranda addressed to them.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. The court of appeals correctly ruled that the Secretary's designation should not be set aside, concluding that the allegedly "premature" publication of the Notice of Availability in the Federal Register did not deprive any interested party of his right to comment on the EIS. In *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978), and *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87 (1983), this Court explained that agency action may be reversed only for substantial procedural defects that prevent the public "from making as full a presentation as desired" (462 U.S. at 108). No such defect infected the EIS process in this case; indeed, petitioners have admitted as much by defining the "prejudice" to their interests as the identity of the decisionmaker (84-544 Pet. 26-27; 84-553 Pet. 19-20). The court of appeals correctly held that this "interest" is not protected by NEPA's procedural provisions (Pet. App. A5):

> The irregularity in filing the notice before circulation * * * had no effect whatsoever on [petitioners'] opportunity to review the EIS after publication of the notice; nor did it affect the opportunity of the interested agencies and members of the public to review the statement for 30 days following publication. The "premature" publication about which [petitioners] complain is significant only because delay of a week in publication would have prevented the matter from being decided by Secretary Andrus rather than by his successor.

The court of appeals also correctly concluded that any deviation from CEQ's timing regulations was "trivial" within the meaning of those regulations. In anticipation of just this type of lawsuit, the CEQ regulations provide that "[i]t is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action" (40 C.F.R. 1500.3).[4] Similarly, the Administrative Procedure Act, 5 U.S.C. 706, directs courts not to become embroiled in quibbles about agency action unless the error is "prejudicial." No such error occurred in this case. Petitioners never argued that the timing of the Secretary's decision actually precluded them from presenting any relevant information to the Secretary or that they were in any way prejudiced.[5] In short: "The integrity of the decisionmaking

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[4]The court of appeals properly deferred to CEQ's interpretation of its own regulations. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979). Moreover, as explained in the declaration of William Hedeman, Director, Office of Federal Activities, EPA, the procedure for filing and distributing EISs and publishing Notices of Availability that was followed in this case has been employed frequently by EPA. The Hedeman declaration explains that the intent of the CEQ regulations is fully satisfied so long as the FEIS is available to the public at the time the Notice of Availability is published. Petitioners do not dispute that the FEIS in this case was in fact available on the December 17 publication date.

[5]Notwithstanding petitioners' allegations of political improprieties (84-544 Pet. 26-27; 84-553 Pet. 19-20), we note that the district court rejected the contention that political motivations undermined the objectivity of the decisionmaking process (Pet. App. A28), and the court of appeals did not disturb that finding.

process within the government and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way" (Pet. App. A7).

2. The court of appeals properly reversed the district court's second reason for overturning the Secretary's decision, namely, that the "full import" of the California state court decision had not been brought to the Secretary's attention when he made his decision. The district court's ruling was wrong for at least three reasons. First, as the state court itself recognized (Pet. App. A186-A187), whether the State of California can satisfy the "permanent administration" requirement of the federal Wild and Scenic Rivers Act is a matter of federal, not state, law. The Secretary's interpretation of the state court's analysis of the term "permanent administration" (which the state court itself recognized as dictum) amounted to the interpretation of federal law he was entrusted to administer, and, as such, was entitled to deference. See, *e.g., Chevron U.S.A., Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip. op. 6-7.[6] Second, that portion of the state statute requiring legislative approval of river management plans (upon which the state court's dictum

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[6]Although petitioners deny that the Secretary had any discretion to determine the weight to be accorded the state court decision, the *Evaluation* (at 1) clearly explains the discretionary nature of the Secretary's decision on the "permanent administration" requirement:

> No State can make an irrevocable commitment that a particular river will remain in a State system forever. Because each State, as an element of its sovereignty, reserves the option to amend, modify, or repeal a river designation, the "permanent" standard of the Federal law must be viewed in this relative, rather than absolute context. It follows that the permanency of a State's commitment is a matter for the exercise of reasoned, discretionary judgment by the Secretary of the Interior.

This analysis also disposes of petitioners' contention (84-544 Pet. 14-16; 84-553 Pet. 15 n.5) that the California legislature's designation of the Eel River was too conditional to satisfy the standards of the federal statute.

rested) was repealed on September 27, 1982, by California Assembly Bill No. 1349 (Pet. App. A111-A113); hence, this issue had already become moot before the district court invalidated the Secretary's decision.[7] Third, as the court of appeals recognized, the Secretary was presented with the state court decision; he concluded, however, that other provisions of state law provided adequate protection to satisfy the "permanent administration" requirement imposed by federal law (Pet. App. A10; see pages 5-6, *supra*).

3. Finally, petitioners' challenge (84-544 Pet. 27-29; 84-553 Pet. 20-23) to the propriety of the court of appeals' grant of summary judgment to the government on all issues, including the adequacy of the FEIS, raises no issue warranting intervention by this Court. The full administrative record, including the FEIS, was before the Ninth Circuit, and that court was fully able to gauge whether plaintiffs' NEPA challenges were substantial or whether the issue of NEPA compliance was being used as a "tactic of litigation and delay." *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (footnote omitted). See, *e.g.*, *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 470 F.2d 289, 301 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973), in which the court stated:

> Ordinarily, we would remand the matter to the trial court for such review, but it is not necessary to do so in

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[7]In deleting the requirement for river management plans from the state statute, the California legislature specified (Pet. App. A139) that its action was not to affect this litigation. But it was of course not open to the state legislature to attempt to override the strictures of Article III of the Constitution. And even if one were to assume that a case or controversy survived the amendment of the state statute, the exercise of this Court's certiorari jurisdiction to review the relationship between a discretionary federal decision and a state statute no longer in existence clearly is not warranted.

this case. The complete record, including the environmental impact statement and the transcript of the proceeding below, is before us. We have reviewed the record thoroughly and are convinced that even if all factual disputes are resolved in favor of the plaintiffs, the decision of the Corps to complete the dam cannot be set aside as arbitrary and capricious.

No different result is called for in the instant case.[8]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1984

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[8]Petitioners' attempt (84-544 Pet. 20-21; 84-553 Pet. 1) to inject a Tenth Amendment claim into this case is unavailing for it was not raised before the district court or the court of appeals. See, *e.g.*, *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975). In any event, it is clear that the secretarial designation made at the specific request of the Governor of California raises no Tenth Amendment issue.

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Nos. 84-544 & 84-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASSOCIATION OF CALIFORNIA WATER AGENCIES, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

and

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

COUNTY OF DEL NORTE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

and

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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LIST OF CORPORATE PARTIES' PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

In accordance with Supreme Court Rule No. 28.1, the parent companies, subsidiaries, and affiliates of each Respondent that is a corporation are as follows:

The Sierra Club is affiliated with the Sierra Club Legal Defense Fund and the Sierra Club Foundation, which are California non-profit corporations, and with the Sierra Club of Ontario, the Sierra Club of Ontario Foundation, and the Sierra Club of Western Canada, which are Canadian non-profit corporations. The Sierra Club has no parent companies or subsidiaries.

The Environmental Defense Fund and California Trout, Inc. have no parent companies, subsidiaries, or affiliates.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the Secretary of the Interior did not violate regulations promulgated by the Counsel on Environmental Quality ("CEQ") where (a) the Secretary waited longer than the thirty days required by the regulations before designating portions of five northern California rivers as components of the National Wild and Scenic Rivers System, (b) the regulations themselves provide that "trivial" departures from the requirements of the regulations shall not invalidate agency action, (c) there was no finding of bad faith, and (d) neither Plaintiffs nor any other person or public agency suffered injury.

2. Whether the Court of Appeals erred in concluding that the Secretary did not act arbitrarily or capriciously where full review of the administrative record "belies" Plaintiffs' contention that the Secretary failed to consider a factor relevant to his decision to designate the rivers.

3. Whether the Court of Appeals erred in deciding that the Secretary did not abuse his discretion in including the rivers in the National System.

4. Whether the Court of Appeals erred in concluding that no triable issues of fact exist to support Plaintiffs' claim that the final Environmental Impact Statement with respect to the proposed designation was inadequate.

Nos. 84-544 & 84-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASSOCIATION OF CALIFORNIA WATER AGENCIES, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

and

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

COUNTY OF DEL NORTE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

and

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents—the Environmental Defense Fund, the Sierra Club, California Trout, Inc., and Save the American River Association—respectfully request the Court to deny the petitions for writs of certiorari, which seek review of the

decision of the United States Court of Appeals for the Ninth Circuit in these cases. The opinion of the Court of Appeals is reported at 732 F.2d 1462 (9th Cir. 1984). The opinion of the Court of Appeals denying the petitions for rehearing is unreported, but is reproduced as Appendix B to the petition for writ of certiorari filed by the Association of California Water Agencies, *et al.*[1]

STATEMENT OF THE CASE

I.

THE NATIONAL WILD AND SCENIC RIVERS ACT

In enacting the National Wild and Scenic Rivers Act of 1968, Congress declared it to be

> "[t]he policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271.

The purpose of the Act was to complement "the established national policy of dam and other construction at appropriate sections of the rivers of the United States" with "a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes." *Id.*[2]

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[1] Petitioners Association of California Water Agencies, *et al.* are referred to herein as "ACWA Plaintiffs"; Petitioners County of Del Norte, *et al.* are referred to as "Del Norte Plaintiffs." The material contained in the appendix to the petition for writ of certiorari filed by the ACWA Plaintiffs is cited as "ACWA App."; citations to the appendix to the petition for writ of certiorari filed by the Del Norte Plaintiffs are designated "Del Norte App." References to the appendix attached to this brief in opposition are cited as "EDF App."

[2] Thus, the Act prohibits the Federal Energy Regulatory Commission from licensing the construction of any hydroelectric facility on a component river (16 U.S.C. § 1278(c)), withdraws from appropriation all minerals in the federal lands located within one-quarter mile of a component river (*id.* § 1280(a)(iii)), and requires all federal agencies with jurisdiction over lands adjacent to a component river to manage those lands so as "to protect such rivers in accordance with the purposes of [the Act]." *Id.* § 1283(a).

Congress originally designated ten rivers as components of the National Wild and Scenic Rivers System (*id.* § 1274(a)(1)-(10)) and reserved the authority to add other rivers to the system in the future. *Id.* § 1273(a)(i). It also provided that the Secretary of the Interior could include in the National System rivers designated as wild and scenic under state law. *Id.* § 1273(a)(ii). Congress gave the Secretary this authority in order to ensure that state-designated rivers would not be adversely affected by the activities of federal agencies "without the full knowledge and consent of Congress." H.R. Rep. No. 90-1623, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 3801, 3803; *see* note 2, *supra*. Thus, Section 2(a)(ii) of the Act provides that the Secretary may place rivers in the National System if four conditions are met:

1. The Governor of the State through which the rivers flow requests the Secretary to designate the rivers as components of the National System.

2. The rivers have been "designated as wild, scenic or recreational rivers by or pursuant to an act of the Legislature of the State . . . through which they flow."

3. The Secretary determines that the rivers "are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State . . . without expense to the United States."

4. The Secretary finds that the rivers "meet the criteria established in [the Act] and such other criteria supplementary thereto as he may prescribe." 16 U.S.C. § 1273(a)(ii).

The petitions for writs of certiorari question the manner in which the Secretary applied these criteria to the facts of these cases.

II.

GOVERNOR BROWN'S APPLICATION AND SECRETARY ANDRUS' DESIGNATION

On July 18, 1980, California Governor Edmund G. Brown, Jr. asked Secretary of the Interior Cecil D. Andrus to include portions of five Northern California rivers—the Smith, Klamath, Eel, Trinity, and Lower American—in the National Rivers System. EDF App. A. In accordance with Section 2(a)(ii) of the National Wild and Scenic Rivers Act, all of the rivers included in the application are components of the California Wild and Scenic Rivers System, having been designated as such by the California Legislature in 1972. Cal. Pub. Res. Code §§ 5093.54 & 5093.545 (West Supp. 1984).

The Heritage Conservation and Recreation Service of the Department of the Interior ("HCRS") began its evaluation of California's application on July 21, 1980. ACWA App. S. HCRS determined that the proposed designation required an Environmental Impact Statement ("EIS"). Although not required by regulation, HCRS held eight public meetings on the scope of the EIS. 45 Fed. Reg. 52,459 (1980). After reviewing comments submitted by the public and federal agencies, HCRS, with the assistance of various California officials, prepared a draft EIS, which it filed with the Environmental Protection Agency ("EPA") on September 16, 1980. *County of Del Norte* v. *United States,* 732 F.2d 1462, 1465 (9th Cir. 1984).

As part of the public review process on the draft EIS, HCRS conducted ten public meetings in five cities. 45 Fed. Reg. 66,213 (1980). The meetings were widely attended, and a full range of views and criticisms was received and documented. In accordance with Interior Department regulations, HCRS extended the comment period to November 20, 1980, providing a total of sixty-two days for public comment on the draft EIS—seventeen days longer than required by the applicable CEQ regulation, 40 C.F.R. § 1506.10(c). 45 Fed. Reg. 70,325 (1980).

Nevertheless, some of the Del Norte Plaintiffs filed suit, seeking to extend the public comment period even longer. On November 14, 1980, the District Court issued a temporary restraining order, which forbade HCRS to close the comment period on the draft EIS. *Del Norte,* 732 F.2d at 1465. Concluding that it lacked jurisdiction, however, the District Court subsequently dissolved the order on December 1, 1980. *Id.* The comment period, extended eleven days by the TRO, officially closed on that date. HCRS nonetheless accepted and considered additional comments through December 5, which provided a total of seventy-six days for public comment on the draft EIS—thirty-one days more than required by the CEQ regulations. *Id.*

In light of the comments received during the review period, HCRS drafted a final EIS, which it filed with EPA on Friday, December 12, 1980. HCRS also made available to the public that day copies of the final EIS at its offices in San Francisco and Washington, D.C. *Id.* Over the weekend, HCRS began mailing copies of the final EIS to 700 "priority" recipients and completed its distribution on Monday, December 15, 1980. *Id.* Plaintiffs received their copies of the final EIS on Wednesday, December 17. *Id.* On that same date, HCRS published a "notice of availability" in the Federal Register, which stated that the final EIS was available for public inspection at a variety of federal offices. *Id.;* 45 Fed. Reg. 83,031 (1980); Del Norte App. 6.

According to Section 1506.10 of the CEQ regulations, thirty days must elapse between publication of the notice of availability of the final EIS and the Secretary's decision on the proposed designation. 40 C.F.R. § 1506.10. As January 16, 1981 approached, three lawsuits were filed, one by the Del Norte Plaintiffs, which sought to enjoin the Secretary from acting until January 21, 1981 at the earliest. By that date, of course, Secretary Andrus would have been replaced by James Watt, the first Secretary of the Interior for the Reagan Administration. In two of the cases, the District Courts granted temporary relief, restraining Secretary Andrus from acting on California's application. *County of Josephine* v. *Andrus,* No.

CV 81-34 (D. Ore. filed Jan. 15, 1981); *County of Del Norte* v. *Andrus,* No. C 80 3964 WAI (N.D. Cal. filed Jan. 16, 1981); ACWA App. H. On January 19, 1981, the last full day of the Carter Administration, the Court of Appeals vacated these orders, ruling that the District Courts lacked jurisdiction because final agency action had not yet occurred. *County of Josephine* v. *Andrus,* No. 81-3036, and *County of Del Norte* v. *Andrus,* No. 81-4030 (9th Cir. filed Jan. 19, 1981); ACWA App. I.

That same day, Secretary Andrus accepted California's application in part and designated 1,235 river miles as components of the National Wild and Scenic Rivers System.[3] *Del Norte,* 732 F.2d at 1465. In one of his last official acts, Secretary Andrus formally transmitted his decision to Governor Brown in a letter mailed on the morning of January 20, 1981. EDF App. B.

III.

THE LITIGATION

Shortly thereafter, Plaintiffs commenced the present litigation. They claimed that Secretary Andrus' designation of the five California rivers was invalid, because: (1) the Secretary acted prematurely under the CEQ regulations; (2) the Secretary's conclusion that California would be able permanently to administer the rivers was arbitrary and capricious; and (3) the final EIS was inadequate. Respondents were granted leave to intervene in the cases as defendants.

On February 9, 1983, the District Court granted Plaintiffs' motion for summary judgment and invalidated the Secretary's designation of the rivers. ACWA App. D. Defendants appealed this decision, and the Court of Appeals reversed. *County of Del Norte* v. *United States,* 732 F.2d 1462 (9th Cir. 1984).

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[3] Governor Brown had asked the Secretary to include a total of 4,006 river miles in the National System. EDF App. A.

First, the Court of Appeals held that there was no basis for the designation to be set aside under the CEQ regulations. *Id.* at 1464. Plaintiffs had urged that the filing of the final EIS with EPA on Friday, December 12, 1980 was premature, because HCRS did not complete its mailing to the public until Monday, December 15. Section 1506.9 of the CEQ regulations provides that filing may occur no earlier than the EIS is "transmitted to commenting agencies and made available to the public." 40 C.F.R. § 1506.9. In turn, Section 1506.10 states that EPA "shall publish a notice in the Federal Register each week of the environmental impact statements filed during the preceding week." *Id.* § 1506.10(a). Thus, Plaintiffs argued, the earliest date on which the final EIS could be filed with EPA was December 15 (*i.e.*, when distribution was completed), and the notice of availability could be published no earlier than the week of December 22, 1980. Section 1506.10 also provides that agency action based on the final EIS may not occur until at least thirty days after publication. *Id.* § 1506.10(b)(2). Under Plaintiffs' theory, therefore, the Secretary could not have acted until January 21, 1981. Accordingly, Secretary Andrus' designation of the rivers on January 19 was premature by two days.

The Court of Appeals acknowledged Plaintiffs' factual arguments, but concluded that the substantive requirements of the CEQ regulations had been fulfilled. According to the Court, the purpose of Sections 1506.9 and 1506.10

> "[i]s to ensure that all pertinent information is available on proposed action for a period of 30 days before final action is taken, and that interested parties have notice of that availability. This 30-day period is not for the purpose of additional public comment and review, *California* v. *Block,* 690 F.2d 753, 771 (9th Cir. 1982), but, in the words of one commentator, is 'to allow a sufficient review period for the final statement and comments and views of commenting agencies "to accompany the proposal through the existing agency review process."' 2 F. Grad, *Treatise on Environmental Law* § 9.02 at 9-113 (1980) (quoting 42 U.S.C. § 4332(2)(C)). The provision for publication the week following distribution and filing of the EIS is no more than a precautionary measure to ensure the desired result." *Del Norte,* 732 F.2d at 1466.

The Court observed that, by the time the notice of availability appeared in the Federal Register, copies of the final EIS had been distributed to the public and all commenting agencies as required by Section 1506.9. *Id.* at 1465. Indeed, Plaintiffs had *received* their copies by December 17, 1980, the date on which the notice appeared. *Id.* Moreover, the Secretary waited thirty-three days—three days longer than required by Section 1506.10—before taking action on the final EIS. *Id.*

Under these circumstances, the Court concluded, the alleged irregularities in the timing of the filing and publication of the final EIS fell within the scope of Section 1500.3 of the CEQ regulations, which declares "the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action." 40 C.F.R. § 1500.3. For executive action to be struck down under Section 1500.3, the Court held, the alleged violation of the regulations "must have borne some relationship to the decision making process itself." *Del Norte,* 732 F.2d at 1466. Here, the purported violation did not prevent the Secretary from fulfilling his duties under the regulations, for "when the Secretary designated the rivers on January 19, more than the required 30 days following publication had passed." *Id.* at 1465. Nor were Plaintiffs, or anyone else, harmed in any way. As the Court emphasized:

> "The irregularity in filing the notice before circulation . . . had no effect whatsoever on the plaintiffs' opportunity to review the EIS after publication of the notice; nor did it affect the opportunity of the interested agencies and members of the public to review the statement for 30 days following publication." *Id.*[4]

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[4] Throughout this litigation, Plaintiffs have argued that they were "injured" by the allegedly premature filing of the final EIS, because "[h]ad the Notice of Availability been published one week later, in accordance with law, Governor Brown's application would have been referred to Secretary Andrus' successor for action." ACWA Pet. 26. As the Court of Appeals aptly noted,

> "[i]t was, however, in large part the actions of these plaintiffs, in obtaining a temporary restraining order in November, 1980, that made the 'prematurity' significant. The order delayed approval of the EIS for seventeen days before the district court dissolved it for lack of jurisdiction." 732 F.2d at 1466.

Accordingly, because "[t]he integrity of the decision making process and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way," the Court ruled that the District Court had no authority to set aside the Secretary's action. *Id.* at 1466-67.[5] The Court also referred to "the general rule that insubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside." *Id.* at 1467 (citing, *inter alia, Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)).

Second, the Court of Appeals held that Secretary Andrus did not act arbitrarily or capriciously. The District Court had ruled that, in deciding to include the rivers in the National System, the Secretary did not adequately consider "language from a California Superior Court opinion in a suit by many of these same plaintiffs to enjoin the California Governor from applying for federal designation of the rivers." *Id.* at 1467. In *County of Del Norte* v. *Brown,* No. 292019 (Cal. Super. Ct. Sacramento Co. filed Dec. 5, 1980), Judge Fred W. Marler, Jr. held that he had no power to order Governor Brown to withdraw his application to Secretary Andrus. ACWA App. P, at A-186-A-187. Judge Marler went on to state his opinion, however, that under the California Wild and Scenic Rivers Act as it existed in December 1980, the Governor had no authority

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[5] The Court acknowledged that when the final EIS was filed with EPA on Friday, December 12, 1980, a staff member of HCRS signed a declaration that incorrectly stated that distribution of the EIS had been completed. 732 F.2d at 1467; *see* Del Norte App. 4. In fact, complete distribution was not accomplished until Monday, December 15. 732 F.2d at 1465. Although "mindful and respectful of the district court's concern ... that the false statement itself was a blemish on the decision making process," the Court of Appeals held that the false affidavit was legally irrelevant, because it was not made in bad faith and had no effect on either the Plaintiffs or the Secretary's action. *Id.* at 1467. Indeed, the Court observed that "[o]n appeal, plaintiffs properly have refrained from arguing that the falsity of the declaration has any independent significance." *Id.*

to commit the State permanently to administer the rivers.[6] The Judge acknowledged that it was within the discretion of the Secretary of the Interior to determine whether California could "permanently administer" its rivers within the meaning of Section 2(a)(ii) of the National Wild and Scenic Rivers Act. *Id.* at A-188. He stated, however, that the Secretary—who was not a party to the lawsuit—should decide this question in light of the state court's interpretation of the California Act. *Id.*

In the present cases, the District Court held that this admonition had not been adequately drawn to Secretary Andrus' attention. ACWA App. D, at A-31; 732 F.2d at 1467. The Court of Appeals reversed. It concluded:

> "Full review of the record reveals . . . that the decision was both paraphrased in a memorandum to the Secretary and attached in full as an addendum to that memorandum. The Secretarial Issue Document noted the state court opinion, but concluded that sufficient other state law protections existed to satisfy the permanent administration requirement under the federal act. The record thus belies the contention that the state court opinion was not considered. In the absence of clear evidence to the contrary, courts presume that public officers properly discharge their duties, including reading memoranda addressed to them." *Id.* at 1468.

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[6] At the time Judge Marler issued his memorandum decision, the California Wild and Scenic Rivers Act required the Secretary of the California Resources Agency to "[p]repare a management plan to administer the rivers and their adjacent land areas" and to "[s]ubmit such management plan to the Legislature for its approval." Cal. Pub. Res. Code § 5093.58 (West Supp. 1982); ACWA App. M, at A-108. Judge Marler reasoned that, because the California Legislature had not yet approved a management plan for the rivers included in Governor Brown's application, the California Secretary for Resoruces could not "guarantee to 'permanently administer' the five rivers." ACWA App. P, at A-186. This issue is now moot, however, because the California Legislature amended the state Wild and Scenic Rivers Act in 1982 to eliminate the requirement that a management plan be submitted to and approved by the Legislature. Cal. Stats. 1982, ch. 1481, p.8004, § 10; ACWA App. M, at A-133.

Finally, the Court of Appeals held that there exist no triable issues of fact to support Plaintiffs' claim that the final EIS was inadequate. ACWA App. B. Accordingly, the Court reversed the judgment of the District Court and ordered the cases remanded for entry of judgment in favor of Defendants. 732 F.2d at 1468.

REASONS WHY THE WRITS SHOULD BE DENIED

The petitions for writs of certiorari are long on rhetoric,[7] but short on explanation why this Court should review the decision of the Court of Appeals. In fact, there is no reason for the Court to exercise its discretionary jurisdiction, for the Court of Appeals' decision involves nothing more than the application of well-settled principles of administrative law to a complex set of facts.

I.

THE COURT OF APPEALS' PROPER DEFERENCE TO THE CEQ'S INTERPRETATION OF ITS OWN REGULATIONS DOES NOT MERIT REVIEW BY THIS COURT.

The Court of Appeals held that the District Court erred in setting aside the Secretary's designation of the rivers as premature under the CEQ regulations, because the District Court's action was inconsistent with the Council's own admonition that "any trivial violation of these regulations not give rise to any independent cause of action." 40 C.F.R. § 1500.3, *discussed in Del Norte*, 732 F.2d at 1466. This decision involves no issue of statutory interpretation. Rather, the Court simply applied the CEQ's interpretation of its own regulations to the procedures followed by HCRS and EPA in filing and publishing the final EIS.

As the Court of Appeals observed, the purpose of the "trivial violation" rule was to make clear the Council's intention that " 'trivial departures from the requirements established by the Council's regulations' " not "result in judicial invalidation

[7] *See, e.g.*, Del Norte Pet. 23: "This case presents a serious attack on our system of government."

of agency actions." 732 F.2d at 1466 (quoting National Environmental Policy Act—Regulations: Comments and the Council's Response, 43 Fed. Reg. 55,981 (1978)). The Court concluded that this admonition must mean that "[a]ny violation which in the end requires the agency action to be set aside must have borne some relationship to the decision making process." *Id.* Because all of the substantive requirements of the regulations had been fulfilled—the EIS had been distributed to the public and all commenting agencies by the time the notice of availability appeared in the Federal Register, and the Secretary waited more than thirty days before acting on the final EIS—the Court of Appeals held that the "irregularities" in the filing and distribution of the EIS were "trivial" and therefore nonactionable under Section 1500.3. *Id.*

Thus, as required by *Andrus* v. *Sierra Club,* 442 U.S. 347, 358 (1979), and other cases,[8] the Court of Appeals properly deferred to the CEQ's interpretation of its own regulations. Indeed, the Court had before it declarations from the Director of the Office of Federal Activities of EPA and the Chairman of the CEQ under the Carter Administration and an affidavit from the General Counsel of the CEQ under the Reagan Administration, which stated that the procedure followed by HCRS and EPA in these cases was a well-established administrative practice and fully satisfied the public review and comment requirements of Sections 1506.9 and 1506.10. EDF App. C-E.

The Court of Appeals' decision involves nothing more significant than judicial deference to the CEQ's interpretation of its own regulations. This deference accords with the decisions of this Court and other federal courts cited above. Accordingly, there are no "special or important reasons" for this Court to review the Court of Appeals' decision.

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[8] *See, e.g., Sierra Club* v. *Sigler,* 695 F.2d 957, 972 (5th Cir. 1983) (CEQ's interpretation of its own regulations "are binding on this court and agencies preparing EIS's"); *Pacific Coast Medical Enterprises* v. *Harris,* 633 F.2d 123, 131 (9th Cir. 1980) (agency's construction of one of its own regulations must "be affirmed if it is not clearly erroneous or inconsistent with the regulation").

II.

THE COURT OF APPEALS CORRECTLY APPLIED THE DECISIONS OF THIS COURT IN CONCLUDING THAT THE SECRETARY DID NOT ACT ARBITRARILY OR CAPRICIOUSLY.

The Court of Appeals' conclusion that Secretary Andrus did not act arbitrarily or capriciously similarly does not warrant review by this Court. Plaintiffs alleged, and the District Court held, that dictum in a California Superior Court opinion—that California would not be able permanently to administer the rivers—was not adequately drawn to the Secretary's attention. *See* pp. 9-10, *supra*. As the Court of Appeals pointed out, "[f]ull review of the record reveals, however, that the decision was both paraphrased in a memorandum to the Secretary and attached in full as an addendum to that memorandum." *Del Norte,* 732 F.2d at 1468. The Court concluded that "[t]he record thus belies the contention that the state court opinion was not considered." *Id.*

There is no reason for this Court to grant certiorari simply to review this decision. The Court of Appeals correctly found that, before making his designation decision, the Secretary considered the state court's admonition that California would not be able permanently to administer the rivers until the Legislature had approved a management plan for them. As the Court noted, not only was the state court's opinion paraphrased in the Secretarial Issue Document ("SID"), but the entire text of the opinion was attached as an addendum to the SID. *Id.* at 1468; *see* Del Norte App. 1, at A-7. Indeed, in his letter to Governor Brown, Secretary Andrus made clear his understanding that the California Legislature had not yet approved a river management plan. The Secretary stated that "California has fulfilled the requirements of Section 2(a)(ii) of the Act by designating the rivers under the California Wild and Scenic Rivers Act and by adopting a program of action which is adequately protecting the river environments from adverse state and local actions." EDF App. B. He encouraged the Governor, however, "in completing formal management plans for the rivers and in having them adopted by the State Legislature. These would serve to focus attention on the state's protective

program and would provide additional details of land use regulation and resource administration." *Id.*

Thus, the administrative record abundantly supports the Court of Appeals' conclusion that the Secretary considered the state court's interpretation of Section 2(a)(ii) of the National Rivers Act. The Court of Appeals applied the correct legal standard to its review of the record.[9] Accordingly, there is no reason for this Court to review the Court of Appeals' review of the administrative record.

III.

THERE IS NO REASON FOR THIS COURT TO REVIEW THE SECRETARY'S DISCRETIONARY DECISION TO DESIGNATE THE RIVERS.

Plaintiffs also claim that the Secretary's inclusion of the rivers in the National System was an abuse of his discretion, because the California Legislature had not yet approved a management plan for the rivers. According to Plaintiffs, this fact is of twofold significance. First, Plaintiffs argue that until the Legislature approves a management plan, the rivers are not "designated" wild and scenic under California law as required by Section 2(a)(ii) of the National Rivers Act. ACWA Pet. 14-16; Del Norte Pet. 11-13; *see* p. 3, *supra*. Second, Plaintiffs urge that in the absence of a management plan the Secretary was required to find that California would not be able permanently to administer the rivers. ACWA Pet. 13-15; Del Norte Pet. 16-18. Plaintiffs raised this claim only on petition for rehearing (*see* ACWA App. C., at A-14-A-19), which the Court of Appeals denied. ACWA App. B.

Contrary to Plaintiffs' assertions, the National Wild and Scenic Rivers Act contains no requirement that the state legislature approve a management plan for the rivers, and the

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[9] *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971) ("court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgement"); *cf. Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 103 S. Ct. 2856, 2867 (1983) ("agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem").

California Wild and Scenic Rivers Act makes no mention of "permanent administration."[10] As the language of Section 2(a)(ii) of the National Act makes clear, the sole purpose of the permanent administration requirement is to ensure that the State will be able permanently to administer the rivers "without expense to the United States other than for administration and management of federally owned lands." 16 U.S.C. § 1273(a)(ii). The permanent administration element of the federal statute thus has nothing to do with the management plan requirement of the California statute.

With this understanding of the two Acts in mind, it is clear that Plaintiffs' claim does not merit review by this Court. First, the issue raised by Plaintiffs is relevant only to the facts of these cases. Plaintiffs have not identified any other state that requires its legislature to approve a management plan for rivers it has designated as wild and scenic; nor are we aware of any such state. Moreover, management plans are no longer necessary even in California, for in 1982 the State Legislature amended the California Wild and Scenic Rivers Act to eliminate that requirement. Cal. Stats. 1982, ch. 1481, p.8004, § 10; ACWA App. M, at A-133. Thus, there is no reason to believe that the issue whether the Secretary may include rivers in the National Rivers System for which the state legislature had not yet approved a management plan will arise in any future case.

Second, there is no conflict between Secretary Andrus' designation of the rivers and California law. Plaintiffs urge that the rivers had not been "designated" by the California Legislature as required by Section 2(a)(ii) of the National Act, because the Legislature had not yet approved a management plan. This argument is contrary to the language of the

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[10] The ACWA Plaintiffs' statement that the California Legislature "required that, before he could 'permanently administer' the system," the California Secretary for Resources must prepare a management plan for the rivers and submit the plan to the Legislature (ACWA Pet. 17) is a misleading mischaracterization of the California Act. The statute quoted by Plaintiffs, Cal. Pub. Res. Code § 5093.58 (West Supp. 1982), which has now been repealed, did not use the term "permanent administration." *See* ACWA App. L, at A-108. Rather, the permanent administration requirement is solely a matter of federal law, designed to ensure that when the Secretary of the Interior accepts state-designated rivers into the National Rivers System, the United States will not bear any of the cost of their administration. 16 U.S.C. § 1273(a)(ii).

California Wild and Scenic Rivers Act. Section 5093.54 of the Act, which was enacted in 1972, declares that "[t]he following rivers are *designated* as components of the system" and then names the Klamath, Trinity, Smith, Eel, and American Rivers. ACWA App. L, at A-105-A-107 (emphasis added). Thus, the rivers clearly had been "designated as wild, scenic or recreational rivers by or pursuant to an act of the Legislature" as required by Section 2(a)(ii) of the National Act. 16 U.S.C. § 1273(a)(ii).[11]

Plaintiffs also argue that the Secretary had no authority to include the rivers in the National System, because without a management plan approved by the California Legislature the State would not be able permanently to administer the rivers. This argument misapprehends the purpose of the "permanent administration" requirement. Section 2(a)(ii) directs the Secretary to determine that the State can permanently administer the rivers as wild, scenic, or recreational *without expense to the United States.* As the statutory language makes clear, Congress sought to ensure that the State, not the United States, would pay the costs of administering the rivers as components of the state and national rivers systems. The statute reveals no congressional interest, however, in determining *how* the State would go about this task—for example, whether the State would administer the rivers through its Resources Agency or pursuant to a management plan approved by the State Legislature. Thus, the failure of the Legislature to approve a

[11] Plaintiffs contend that Section 5093.54 does not "designate" the Eel River, because it provides that "after an initial period of 12 years following the effective date of this chapter, the Department of Water Resources shall report to the Legislature as to the need for water supply and flood control projects on the Eel River and its tributaries, and the Legislature shall hold public hearings to determine whether legislation should be enacted *to delete* any segment of the river from the system." Cal. Pub. Res. Code § 5093.54(d) (emphasis added); ACWA App. L, at A-106-A-107; *see* ACWA Pet. 14-16. This argument is contradicted by the terms of the statute, which "designates" the Eel and its tributaries as components of the state system, while simply committing the Legislature in 1984 to review this designation and to determine whether "to delete all or any segment of the river from the system." Indeed, the opinion of the California Superior Court on which Plaintiffs rely so heavily in support of their argument about permanent administration, *County of Del Norte* v. *Brown*, No. 272019 (Cal. Super. Ct. Sacramento Co. filed Dec. 5, 1980), confirms that "[t]he Eel River is currently designated as a component of the California System." ACWA App. P., at A-187.

management plan was irrelevant to the Secretary's decision whether California could permanently administer the rivers without expense to the United States. Conversely, the Secretary's inclusion of the rivers in the National System in no way altered the duty of the California Secretary for Resources to submit a management plan to the Legislature (a duty which no longer exists).

Third, Secretary Andrus' decision that, even without a formal management plan, California would be able permanently to administer the rivers was a policy determination within the Secretary's broad discretionary authority. Last Term, this Court confirmed the long-established principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," particularly where the action taken by the department "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782, 2783 (1984). The administrative record in these cases makes clear that Secretary Andrus carefully considered whether the absence of a management plan would disable the State from permanently administering the rivers without expense to the United States. The Secretary reviewed the laws of California and the State's eight-year experience in managing the rivers and concluded that "California has fulfilled the requirements of Section 2(a)(ii) of the [National] Act by designating the rivers under the California Wild and Scenic Rivers Act and by adopting a program of action which is adequately protecting the river environments from adverse State and local actions." EDF App. B.[12] Inasmuch as the Court of Appeals properly deferred to the

[12] The Secretarial Issue Document further explicates the Department's consideration of this question:

> "The California Wild and Scenic Rivers Act requires that the Resources Agency develop management plans for the rivers and submit them to the State legislature for approval. No river has an approved management plan to date, and this has raised serious questions (a major point in lawsuits against the Federal and State governments) as to whether there is assurance that the rivers will be "permanently administered" by the State. Nevertheless, the State has asserted that considerable protection is afforded these rivers where they flow across State and private lands. After review of applicable California legal authorities and existing management practices, a finding has been made that the State has

Secretary's discretionary determination that California could permanently administer the rivers, there is no reason for this Court to review the decision upholding the Secretary's action.[13]

IV.

THIS COURT SHOULD NOT REVIEW THE COURT OF APPEALS' DECISION THAT NO TRIABLE ISSUES OF FACT EXIST TO SUPPORT PLAINTIFFS' CLAIM THAT THE FINAL EIS WAS INADEQUATE.

Plaintiffs' last request is for this Court to review the Court of Appeals' determination that there exist no triable issues of fact to support Plaintiffs' claim that the final EIS was inadequate. This claim involves no issue significant to the administration of NEPA generally. *Cf. Andrus* v. *Sierra Club,* 442 U.S. 347 (1979) (whether federal agencies are required to prepare EIS's to accompany appropriation requests); *Kleppe* v. *Sierra Club,* 427 U.S. 390 (1976) (whether approval of numerous individual coal development projects in Northern Great Plains area required preparation of an EIS for entire region). Rather, the sole question presented is whether the Court of Appeals erred in reviewing the administrative record,

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(Footnote continued from previous page)

provided the required commitment to permanently administer the rivers, has demonstrated a present ability to accomplish this end through an existing administrative framework, and has the necessary legal authority to achieve such protection." United States Department of the Interior, Secretarial Issue Document, California Rivers Application, Jan. 16, 1981; Del Norte App. 1, at A-11-A-12.

[13] Plaintiffs also raise for the first time a claim that the Secretary's designation of the rivers violates the Tenth Amendment. ACWA Pet. 18-21; Del Norte Pet. 15-16. Plaintiffs did not allege this claim in their complaints, nor did they argue the claim before either the District Court or the Court of Appeals. Under these circumstances, they may not present their contentions to this Court. *FTC* v. *Grolier, Inc.,* 462 U.S. 19, 103 S. Ct. 2209, 2212 n.6 (1983); *Rogers* v. *Lodge,* 458 U.S. 613, 628 n.10 (1982); *United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977).

together with the final EIS, and concluding that the EIS was not inadequate.[14] This Court should not expend its limited time adjudicating the adequacy of a single EIS for a specific project that is of no possible relevance to any other federal action.

CONCLUSION

For the reasons set forth above, the petitions for writs of certiorari should be denied.

DATED: December 4, 1984.

Respectfully submitted,

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[14] The Court of Appeals' task was extremely limited. In reviewing the adequacy of an EIS, " '[t]he only role for a court is to insure that the agency has taken a "hard look" at the environmental consequences.' " *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 228 (1980) (per curiam) (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). The courts commonly resolve this question by summary adjudication based on a review of the administrative record. *See, e.g., Strycker's Bay, supra; Conservation Law Foundation of New England, Inc.* v. *GSA*, 707 F.2d 626 (1st Cir. 1983); *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir. 1983); *Izaak Walton League of America* v. *Marsh*, 655 F.2d 346 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Coalition For Canyon Preservation* v. *Bowers*, 632 F.2d 774 (9th Cir. 1980).

APPENDIX

Page

A. Application from Governor Brown to Secretary Andrus pursuant to 16 U.S.C. § 1273(a)(ii) (7-18-80) C.R. 44 ..... A-1

B. Designation of rivers reported in letter from Secretary Andrus to Governor Brown (1-19-81) C.R. 44 A-4

C. Declaration of William Hedeman (6-4-84) C.R. 16A & 49 ..... A-6

D. Declaration of Gus Speth, filed in *County of Del Norte* v. *Andrus,* No. C 80 3964 WAI (N.D. Cal. 1981) (1-15-81) A-10

E. Declaration of Nancy Nord (6-28-82) C.R. 79 .....A-13

APPENDIX A

State of California
GOVERNOR'S OFFICE
SACRAMENTO 95814

EDMUND G. BROWN JR. 916/445-2843

July 18, 1980

The Honorable Cecil D. Andrus
Secretary of the Interior
Interior Building, Room 6151
Washington, D.C. 20240

Dear Secretary Andrus:

Some of the nation's most striking rivers still flow freely through the rugged mountains of Northern California to the sea. These productive rivers and their watersheds are the base of Northern California's economy. They are a stirring symbol of the force and beauty of the natural world as well.

The Legislature of the State of California has designated certain rivers as components of the California Wild and Scenic Rivers System (Public Resources Code Sections 5093.50-5093.64). I also believe that these designated rivers should remain undeveloped; therefore, in accordance with Section 2(a)(ii) of the Wild and Scenic Rivers Act, Public Law 90-542 (16 U.S.C., 1271 et seq.), I do hereby request on behalf of the State of California that the following rivers be designated National Wild and Scenic Rivers:

(a) *Klamath River.* The main stem from 100 yards below Iron Gate Dam to the Pacific Ocean; the Scott River from the mouth of Shackleford Creek west of Fort Jones to the river mouth near Hamburg; the Salmon River from Cecilville Bridge to the river mouth near Somesbar; the North Fork of the Salmon River from the intersection of the river with the south boundary of the Marble Mountain Wilderness Area to the river mouth; Wooley Creek, from

the western boundary of the Marble Mountain Wilderness Area to its confluence with the Salmon River.

(b) *Trinity River.* The main stem from 100 yards below Louiston Dam to the river mouth at Weitchpac; the North Fork of the Trinity from the intersection of the river with the southern boundary of the Salmon-Trinity Primitive Area downstream to the river mouth at Helena; New River from the intersection of the river with the Southern Boundary of the Salmon Trinity Primitive Area downstream to the river mouth near Burnt Ranch; South Fork of the Trinity from the junction of the river with State Highway 36 to the river mouth near Salver.

(c) *Smith River.* All its tributaries from the Oregon-California state boundary to the Pacific Ocean.

(d) *Eel River.* The main stem from 100 yards below Van Arsdale Dam to the Pacific Ocean; the South Fork of the Eel from the mouth of Section Four Creek near Branscomb to the river mouth below Weott; Middle Fork of the Eel from the intersection of the river with the southern boundary of the Middle Eel-Yolla Bolly Wilderness Area to the river mouth at Dos Rios; North Fork of the Eel from the Old Gilman Ranch downstream to the river mouth near Ramsey; Van Duzen River from Dinsmores Bridge downstream to the river mouth near Fortuna.

(e) *American River.* The Lower American from Nimbus Dam to its junction with the Sacramento River.

These rivers will be administered permanently as wild, scenic, or recreational rivers by the Resources Agency, or one of its constituent departments, without expense to the United States other than for the administration and management of federally-owned lands. A partial list of the State's Statutory authority for permanently administering the rivers is attached as Appendix A.

We believe that each of these rivers meets the criteria established in federal statute for inclusion in the National Wild and Scenic Rivers System.

Therefore, I respectfully request that you consider and approve California's application to include the named rivers into the National System.

Sincerely,

EDMUND G. BROWN JR.
Governor

APPENDIX B

EXHIBIT "47"

United States Department of the Interior

Office of the Secretary
Washington, D.C. 20240

January 19, 1981

Honorable Edmund G. Brown, Jr.
Governor of California
Sacramento, California

Dear Jerry:

I am pleased to advise you that favorable action has been taken on your request that five California rivers be designated as components of the National Wild and Scenic Rivers System as provided for in Section 2(a)(ii) of the Wild and Scenic Rivers Act, P. L. 90-542, as amended. The specific segments designated are identified in the enclosed Notice. Although we were not able to designate all 4,000+ miles included in your application, we believe the approximately 1,235 miles designated go a long way toward protecting the essential values of the rivers from adverse Federal actions. I note with pleasure that California now has passed my State of Idaho in numbers and miles of rivers in the National Wild and Scenic Rivers System and in this regard is second in the Nation only to the State of Alaska. This is the most significant use of Section 2(a)(ii) of the Federal Wild and Scenic Rivers Act since its passage in 1968 and serves to demonstrate that protection of natural resource values of the Nation's rivers does indeed involve a Federal/State partnership.

California has fulfilled the requirements of Section 2(a)(ii) of the Act by designating the rivers under the California Wild and Scenic Rivers Act and by adopting a program of action which is adequately protecting the river environments from adverse State and local actions. We encourage you in completing formal management plans for the rivers and in having them adopted by the State legislature. These would

serve to focus attention on the State's protective program and would provide additional details of land use regulation and resource administration.

With regard to the smaller tributaries of the Smith River which were not deemed eligible for the National System, but which California chose to put into its State system, we recognize that the high water quality of those tributaries is essential to maintaining the outstandingly remarkable anadromous fishery resource of the river system. We expect that the State and the U.S. Forest Service will take all necessary steps to sustain and possibly improve their present quality.

Finally, I want to compliment all the personnel in your resources agency who have worked so diligently to make these designations possible. They have worked with the spirit and determination that only true dedication to a cause can elicit. You have every right to be proud of them.

Sincerely,

CECIL D. ANDRUS

Enclosure

cc:
Secy's Files
Secy's RF (2)
AS/FW; LW
Ron Way (FW)
Solicitor
OPA
CL
HCRS
John Haubert (HCRS)

JHaubert:lrp:1/19/81:HCRS:x-4793

APPENDIX C

ORIGINAL
FILED
JUNE 4-1981
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASSOCIATION OF CALIFORNIA WATER AGENCIES, *et al.*,
Plaintiffs

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants

Civil Action No. C-81-1457-WAI
DECLARATION OF

WILLIAM HEDEMAN

I, William Hedeman, do hereby declare and testify:

(1) I am the Director of the United States Environmental Protection Agency's (EPA) Office of Federal Activities. I have served in this capacity since January, 1979.

(2) The Office of Federal Activities is responsible for receiving all environmental impact statements (EISs) filed with EPA pursuant to 40 C.F.R. § 1506.9 and filing Notices of Availability of such EISs pursuant to 40 C.F.R. § 1506.10(a).

(3) Pursuant to 40 C.F.R. § 1506.10(a), the Office of Federal Activities has established an administrative practice which applies when the filing agency cannot meet the normal deadlines EPA has set for its own internal management needs. Our normal practice is that an EIS be filed and distributed on the last day of the work week before the work week in which the Notice of Availability is published in the *Federal Register*. When the filing agency cannot follow our normal practice we allow for the publication of a *Federal Register* Notice of Availability of an EIS during the same week copies of that EIS are distributed to the public and delivered in printed form to EPA. This practice will be followed only if a working copy of the EIS is made available to EPA by the last day of the prior work week, and if copies are distributed to the public and a printed copy is delivered to EPA by the time the Notice of Availability is published in the *Federal Register*. A working copy is required so that EPA will have the information necessary to develop an Agency abstract of the EIS. This abstract is used for purposes of publishing the *Federal Register* Notice. When these conditions are satisfied, EPA treats the EIS as having been filed in accordance with 40 C.F.R. 1506.9 on the date the working copy was delivered to EPA.

(4) This practice has been established to provide administrative flexibility in the implementation of the requirements of section 1506.10(a) while satisfying the intent of section 1506.9 that the EIS be available for review at the time the Notice of Availability is published in the *Federal Register*.

(5) This adminsitrative practice has been followed in the following instances:

Agency	EIS Status	Project	Date Arrangement Made with EPA
Corps of Engineers	Final	Permit-Prudhoe Bay-Water Flood Project, Alaska	10/9/80
Nuclear Regulatory Commission (NRC)	Final	Primary Cooling System-Chemical Decontamination at Dresden Nuclear Power Station, Unit #1	10/20/80
Air Force	Draft	Consolidated Space Operation Center	10/24/80
EPA	Final	201 Project for Santa Fe, New Mexico	10/24/80
Bureau of Land Management	Draft	E.P.S.I. Coal-Slurry Pipeline Project	10/29/80
NRC	Draft Supplement	Virgil C. Summer, Unit #1 Fairfield County, South Carolina	11/6/80
Office of Surface Mining (OSM)	Final	Alton Mine, Utah, Section 522 Determination	11/12/80
Fish and Wildlife Service	Final	Trinity River Project	11/25/80
HCRS	Final	Pinelands Reserve, New Jersey	12/3/80
Federal Energy Regulatory Commission (FERC)	Draft Supplement	Small Power Production and Co-Generation Facilities	12/4/80
HCRS	Final	California Wild and Scenic Rivers Proposal	12/10/80

Agency	EIS Status	Project	Date Arrangement Made with EPA
OSM	Final	Rojo-Caballos Mine Reclamation Plan	1/27/81
FERC	Final	Sulton River Project	2/27/81
National Oceanic and Atmospheric Administration	Draft	Deep Sea Bed Mining Program	3/12/81
FERC	Final	Small Power Production and Co-Generation Facilities	2/17/81 (approximate)

This list may not cover all instances for which this practice has been followed.

(6) Working copies of the FEIS entitled *Proposed Designation of Five California Rivers in the National Wild and Scenic Rivers System* were provided to EPA on Friday, December 12, 1980. Printed copies were delivered to EPA by Wednesday, December 17, 1980.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C. on June 3, 1981.

WILLIAM HEDEMAN

APPENDIX D

G. WILLIAM HUNTER
United States Attorney

CHARLES M. O'CONNOR
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Attorneys for Defendants

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF DEL NORTE, *et al.*, *Plaintiffs* VS. CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, *et al.*, *Defendants* STATE OF CALIFORNIA, *Intervenor*	**CIVIL No. C-80-3964 W.A.I. DECLARATION OF GUS SPETH**

GUS SPETH declares as follows:

(1) I am Chairman of the President's Council on Environmental Quality (CEQ). The Council is comprised of three members, including myself. As Chairman, I am principally responsible for administering the activities of the Council and staff. I have served in this capacity since July 1, 1979. Between March, 1977 and July 1, 1979, I served as a member of the Council.

(2) The CEQ was created by Title II of the National Environmental Policy Act of 1969 (NEPA). Under NEPA, the Council is located in the Executive Office of the President and is charged with overseeing the efforts of federal agencies to comply with the requirements of this law.

(3) On May 24, 1977, President Carter issued Executive Order 11911, which directed the Council to issue regulations implementing the procedural provisions of NEPA. The Executive Order directed that the NEPA regulations be designed to make the environmental impact statement (EIS) process more useful to decisionmakers and the public, and to reduce paper work and the accumulation of extraneous background data in order to focus on real environmental issues and alternatives. The Council's NEPA regulations were published in the *Federal Register* on November 29, 1978 (43 Fed. Reg. 55798-56007) and became effective eight months later on July 30, 1979. Shortly before the effective date of the NEPA regulations, the Supreme Court relied on the regulations in interpreting NEPA, saying "CEQ's interpretation of NEPA is entitled to substantial deference" and describing the preparatoin of the NEPA regulations as a "detailed and comprehensive process ordered by the President of transforming advisory guidelines into mandatory regulations applicable to all federal agencies." *Andrus* v. *Sierra Club,* 442 U.S. 347 (1979).

(4) The purpose of 40 C.F.R. § 1506.9, taken in conjunction with § 1506.10(b)(2), is to ensure that agencies and the public actually have 30 days for reviewing final EIS's, measured from the time the Environmental Protection Agency (EPA) publishes an EIS notice in the *Federal Register.* No longer period for public review is intended, except as specifically authorized by 40 C.F.R. § 1506.10(d).

(5) The purpose of 40 C.F.R. §§ 1506.9 and 1506.10(b)(2) would be satisfied if a final EIS is available

for public review for 30 days following publication of a *Federal Register* EIS notice.

(6) The first sentence in § 1506.10(a) is intended to facilitate the administrative convenience of EPA and provide EPA with adequate time to carry out its responsibilities for publishing a *Federal Register* notice of the filing of an EIS. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to prevent EPA from publishing a notice in the *Federal Register* for an EIS filed with EPA during the same week the notice appears in the *Federal Register*. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to enlarge the period of time provided under 1506.10(b)(2) for public and agency review of final EIS's.

(7) For these reasons, if the public and the agencies have actually been provided with thirty days to review and comment on the final EIS as required by § 1506.10(b)(2), failure to make complete delivery of the final EIS to the agencies and the public during the period preceding publication of the *Federal Register* notice is not a violation of the public review and comment requirements in the NEPA regulations and is, at most, a "trivial violation" of the second sentence in § 1506.9 within the meaning of 40 C.F.R. 1500.3.

Executed this 13 day of January, 1981, in Washington, D.C. I declare under penalty of perjury that the foregoing is true and correct.

GUS SPETH

APPENDIX G

G. WILLIAM HUNTER
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CHARLES M. O'CONNOR
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**IN THE
UNITED STATES DISTRICT
COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA**

COUNTY OF DEL NORTE, *et al.*, *Plaintiffs* vs. THE UNITED STATES OF AMERICA, *et al.*, *Defendants* STATE OF CALIFORNIA *Intervenor*	**CIVIL No. C-81-0567-W.A.I.**
And ASSOCIATION OF CALIFORNIA WATER AGENCIES, *et al.*, *Plaintiffs* vs. THE UNITED STATES OF AMERICA, *et al.*, *Defendants* STATE OF CALIFORNIA, *Intervenor*	**DECLARATION OF NANCY NORD** **CIVIL No. C-81-1457-W.A.I.**

NANCY NORD declares as follows:

(1) I am General Counsel of the President's Council on Environmental Quality (CEQ) and have served in this capacity since May 18, 1981. I am familiar with the regulations at 40 C.F.R. 1500 *et seq.* promulgated by CEQ on November 29, 1978.

(2) The purpose of 40 C.F.R. § 1506.9, taken in conjunction with § 1506.10(b)(2), is to ensure that agencies and the public actually have 30 days for reviewing final environmental impact statements (EIS's), measured from the time the Environmental Protection Agency (EPA) publishes an EIS notice in the *Federal Register*.

(3) The purpose of 40 C.F.R. §§ 1506.9 and 1506.10(b)(2) would be satisfied if a final EIS is available for public review for 30 days following publication of a *Federal Register* EIS notice.

(4) The first sentence in § 1506.10(a) is to provide EPA with adequate time to carry out its responsibillites for publishing a *Federal Register* notice of the filing of an EIS. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to prevent EPA from publishing a notice in the *Federal Register* for an EIS filed with EPA during the same week the notice appears in the *Federal Register*. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to enlarge the period of time provided under 1506.10(b)(2) for public and agency review of final EIS's.

(5) The purpose of the public review and comment requirements have been met if the public and the agencies have been provided with 30 days to review and comment on the final EIS. Failure to make complete delivery of the final EIS to the agencies and the public as set out in 40 C.F.R. 1506.9 if such failure does not result in the public and the agencies having less than 30 days to review and comment on the Final EIS is merely a "trivial violation" of § 1506.9 and is within the meaning of 40 C.F.R. 1500.3.

Executed this 23 day of June, 1982, in Washington, D.C. I declare under penalty of perjury that the foregoing is true and correct.

NANCY NORD

District of Columbia):
Subscribed and sworn to before me this 23rd day of June 1982